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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOANN FORD BOX,

Petitioner,

v.

A&P TEA COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE F. GALLAND, JR.*
JUDSON H. MINER
PAUL L. STRAUSS

DAVIS, MINER, BARNHILL
& GALLAND
14 West Erie Street
Chicago, IL 60610
(312) 751-1170
Counsel for Petitioner
JoAnn Ford Box

*Counsel of Record

Pandick Midwest, Inc., Chicago • 733-6000

QUESTIONS PRESENTED

1. Can a one-sentence assertion in defendant's summary judgment brief, unaccompanied by evidence, that "plaintiff cannot cite any facts to support her claim," put the burden on plaintiff to offer proof of every element of her *prima facie* case or face summary judgment?[1]

2. May a Court of Appeals affirm an otherwise erroneous grant of summary judgment by deciding that no factual dispute exists on an issue that was not addressed in the district court?

3. When an employer, without taking applications, discriminatorily fills a series of unannounced job openings, does an employee who has informed the employer of her desire to be promoted to this category of position satisfy the "application" requirement of a Title VII *prima facie* case?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit (No. 84-1732) were petitioner JoAnn Ford Box and respondent A&P Tea Company.

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[1] This Court has granted *certiorari* to consider a controlling case on this issue, *Celotex Corp.* v. *Catrett*, No. 85-198. ____ U.S. ____, 106 S.Ct. 342 (1985).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JoAnn Ford Box respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 772 F.2d 1372 and appears as Appendix A to this Petition.

The District Court's ruling granting summary judgment against petitioner was issued from the bench and is unreported. The transcript is attached hereto as Appendix B. The District Court's Order is attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 5, 1985. On November 18, 1985, the Court of Appeals, two judges dissenting, denied petitioner's Petition for Rehearing and Suggestion for Rehearing *en banc*. Appendix D. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves Rule 56 of the Federal Rules of Civil Procedure, set forth in Appendix E, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, relevant portions of which are set forth in Appendix F.

STATEMENT OF THE CASE

In 1979 petitioner JoAnn Ford Box sued the A&P Tea Company, alleging that A&P had violated Title VII of the Civil Rights Act of 1964 by limiting her and other women to low-paid positions in its grocery stores through discrimination in job assignment, training, promotion, and transfer. Jurisdiction of the suit rested on 42 U.S.C. § 2000e-5. The district court granted summary judgment against Ms. Box. The Court of Appeals for the Seventh Circuit, though rejecting the district court's reasons, nonetheless affirmed that summary judgment. This petition seeks review of that affirmance.

Factual Background. The record evidence showed that despite having a predominantly female work force, A&P filled most supervisory job categories in its Chicago Division stores almost exclusively with men (132-3, 140-1, 149-50).[2] For

[2] Citations are to the pages of the record appendix filed with the Court of Appeals.

example, in 1980, when over 50% of the stores' work force was female, 97% of the assistant managers were men, 98% of the produce managers were men, and 99% of the frozen food department heads were men (140). From 1975 to 1980, when over 50% of A&P's grocery clerks were women (149-150), only one woman moved from grocery clerk to assistant manager, while 43 men received such promotions (153). Men got 89% of the promotions to produce department head, dairy department head, and frozen food department head (153). A&P itself noted that its female employees were confined to a limited path of progression. A&P's 1978 "affirmative action plan" (135) states:

> Most of the women are at the Head Cashier level. This seems to be the height of a woman's progression, movement into the store manager, department heads and assistant managers positions are [*sic*] limited.

The record evidence showed no objective reasons for A&P's preference for men over women for these supervisory positions. There were no years of service requirements, no educational standards, no tests, and no written standards or guidelines that governed promotions, assignments, and transfers (69-70, 80, 99, 114-120, 126-8, 159, 212-4). Any employee in any Chicago Division store was eligible to be promoted and transferred to any of the supervisory jobs in the Division (117-8).

Promotion, assignment, and transfer decisions were made by male managers exercising unbounded discretion, simply handpicking the employees they liked (69-70, 80, 82, 99, 114-120). Substantial anecdotal evidence indicated that A&P's male managers thought women were unsuited for jobs held by men (34, 179, 180, 191).

The record showed that women at A&P did not receive notice of supervisory job openings or have an opportunity to apply for them. Openings were not posted and applications

were not taken (71-2, 80, 82, 99, 115, 126-8, 214). Typically, women found out that a supervisory position was being filled when a new male employee began to work at the job (69-70, 71-2, 80, 99, 214).

The record contained evidence that petitioner JoAnn Box had been individually harmed by A&P's preference for men over women. Ms. Box, a black woman, worked for A&P as a cashier and assistant bookkeeper from 1965 to 1978 (50-63). The record evidence showed that Ms. Box repeatedly asked her store managers and supervisors for a promotion or training so she could be promoted (54). At first she concentrated on the bookkeeper position. In 1976, Ms. Box's store manager told her that A&P's bookkeeper school had closed and she would not receive bookkeeper training (34). Ms. Box told her store manager that in that case she wanted to receive training so she could advance to some other position, such as assistant store manager (34). Ms. Box's store manager told her that he didn't think that would be possible. It was the Company's policy to usually promote women only to bookkeeper, he told her (34).

In response to this, Ms. Box filed an amended EEOC charge in July, 1976 (41).[3] That charge complained of sex and race discrimination and specifically mentioned her not having received the job of assistant manager (33, 35, 46). She was not promoted to assistant manager, and A&P continued to fill its assistant manager positions only with men (153). In 1979, Ms. Box filed this Title VII class action.

The Proceedings Below. In the district court, A&P moved for summary judgment as to Ms. Box's sex discrimination claim on two grounds. First, it alleged that she had failed to file an EEOC charge of sex discrimination. Second, it asserted that Ms. Box could not make out a *prima facie* case of sex discrimination because all the bookkeeper jobs which Ms. Box

[3] Ms. Box had filed her original EEOC charge in 1975, alleging race discrimination in filling bookkeeper positions (42-44).

had sought had been filed by women, not men. On February 15, 1984, the district court agreed with both arguments and granted summary judgment to A&P on the sex discrimination claim. Ms. Box appealed.

On September 5, 1985, the Court of Appeals affirmed. *Box* v. *A&P Tea Co.*, 772 F.2d 1372 (7th Cir. 1985). However, it rejected both of the district court's reasons for summary judgment. It found evidence that Ms. Box had filed an EEOC sex discrimination charge, making summary judgment on that issue inappropriate. 772 F.2d at 1375. And it held that even if all bookkeeper positions had been filled by women, that could not justify summary judgment. It noted that Ms. Box was alleging sex discrimination not just in filling bookkeeper positions but also in filling the assistant manager position. A&P had offered no evidence in the district court about assistant manager positions, and Ms. Box's evidence showed that over a three-year period, A&P had promoted 27 male and no female grocery clerks to assistant manager. 772 F.2d at 1375.

Instead of reversing and remanding, however, the Court of Appeals, over a vigorous dissent, affirmed. It did so in two steps. First, it held that Ms. Box—the party *opposing* summary judgment—had the burden of offering evidence in the district court showing that she could prove her *prima facie* case. According to the majority, A&P had imposed this burden on plaintiff simply by asserting in one of its summary judgment briefs that Ms. Box "could not cite any facts to support [her] claim of sex discrimination":

> In the district court, A&P argued in its reply memorandum that Box could not "cite any facts to support the claim" of sex discrimination; A&P cited a section of its initial memorandum that included the statement "when the undisputed facts which emerge from a plaintiff's deposition show that she cannot show a *prima facie* case . . ., summary judgment is appropriate." This argument, although not made as elaborately as the two arguments relied on by the district

> court in granting the motion for summary judgment, gave Box a fair opportunity to submit evidence showing that she could establish a *prima facie* case.

772 F.2d at 1376.[4]

Second, the majority held, for the first time in any appellate opinion, that when an employer has filled openings without announcing them and without accepting applications, a Title VII plaintiff's *prima facie* case must include proof that she would have applied for the openings had the employer made their existence known to her, and must identify the particular openings for which she would have applied. Since Ms. Box had offered no such statement in the district court, the majority asserted that she had failed "to set forth specific facts [in response to the motion for summary judgment] showing that she could . . . establish a *prima facie* case." 772 F.2d at 1377.

According to the majority, this "would have applied" requirement was not satisfied by evidence in the record that Ms. Box had repeatedly asked her store manager for training to be promoted to assistant manager and that she had complained in a 1976 EEOC charge of not being promoted to assistant manager. 772 F.2d at 1377. According to the majority, that evidence only amounted to a "vague interest in the assistant manager position" and it held that "after four years of discovery, Ms. Box has failed to identify for which of these twenty-seven positions she would have applied." 772 F.2d at 1377.[5]

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[4] The quoted language suggests that A&P's motion for summary judgment had cited Ms. Box's deposition to argue that she could not make out a *prima facie* case. That is incorrect. A&P's sole citation to Ms. Box's deposition appeared in a footnote dealing with the scope of her EEOC charge (App. J-4). Ms. Box's deposition was so irrelevant to the proceedings below that neither party designated it for the record on appeal. In an effort to find a basis to affirm summary judgment, the Court of Appeals, after oral argument, ordered Ms. Box's deposition to be made part of the record on appeal. (App. G).

[5] The dissent denounced "the increasing use of summary judgment when the posture of the case calls for a trial." 772 F.2d at 1381. It cited the extensive statistical and anecdotal evidence in the record that A&P chose only men for its supervisory store positions, and noted that Ms. Box had repeatedly expressed interest in advancing to assistant manager. 772 F.2d at 1380-1.

Ms. Box petitioned for reconsideration or rehearing *en banc*. She pointed out why she had not "identified for which of these twenty-seven positions she would have applied": A&P had never raised that issue below. In the district court, A&P had made no argument at all about assistant manager jobs.[6] Thus, the majority had let a nonspecific, nonevidentiary assertion in a brief impose a burden on Ms. Box to offer proof of an element of her case on which A&P had offered no argument or evidence.

The Equal Employment Opportunity Commission, until then a stranger to the proceedings, filed a brief *amicus curiae* in support of Ms. Box's petition for reconsideration or rehearing *en banc*. The EEOC argued that the majority's "would have applied" requirement misstated the standard for establishing a Title VII *prima facie* case. It also argued that by deciding an issue that was not raised below, the majority had misused summary judgment procedures. The EEOC warned that the majority's decision "would seriously hamper both public and private enforcement efforts within this Circuit." (Appendix H.) On November 18, 1985, the Court of Appeals, two judges dissenting, denied Ms. Box's petition.

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[6] All the arguments and evidence A&P presented in the district court are included in its motion and two memoranda, attached (Appendices I, J, and K hereto).

REASONS FOR GRANTING THE PETITION

There are three reasons to grant *certiorari*. First, this Court has granted *certiorari* in a controlling case, *Celotex Corp.* v *Catrett*, ____ U.S. ____, 106 S.Ct. 342 (1985). In *Celotex*, as here, the issue is whether a district court, without any evidentiary showing by defendant, may require plaintiff to provide evidence to support her claim or face summary judgment. Second, the decision below conflicts with the holdings of this Court and other Circuits on an important question of appellate review: whether a court of appeals, after finding erroneous a district court's reasons for granting summary judgment, may affirm that judgment on factual grounds that have not been litigated in the district court. Third, the decision below conflicts with decisions of other Circuits, and with the position of the Equal Employment Opportunity Commission, on the elements of a Title VII plaintiff's *prima facie* case where an employer has filled a job opening without announcing or accepting applications for it.

ARGUMENT

A. The Court's Decision in *Celotex Corp.* v. *Catrett* Will Control This Case

On November 4, 1985, this Court granted *certiorari* to review *Catrett* v. *Johns-Manville Sales Corp.*, 756 F.2d 181 (D.C.Cir. 1985), *cert. granted sub nom. Celotex Corp* v. *Catrett*, ____ U.S. ____, 106 S.Ct. 342 (1985). Whether this Court affirms or reverses in *Celotex*, the decision in *Box* should be vacated and remanded for appropriate proceedings.

The issue in *Celotex*, as here, is whether—and under what circumstances—a district court, *without any evidentiary showing by defendant*, may require plaintiff to offer evidence on an element of her case or face summary judgment as a consequence. *Celotex* was a products liability case in which plaintiff alleged that her deceased husband was injured through exposure to defendant's asbestos product. The defendant moved for summary judgment. Without offering evidence itself, defendant argued that plaintiff would be unable to offer admissible evidence of her husband's exposure to defendant's asbestos. The trial court demanded that plaintiff produce such evidence, and when she failed to do so, it entered summary judgment for defendant.

A divided Court of Appeals reversed. The majority held that F.R.Civ.P. 56 requires the moving party to support a summary judgment motion with evidence. Since defendant had offered no evidence on the exposure issue, the Court found summary judgment improper. 756 F.2d at 185. Judge Bork dissented. He acknowledged that F.R.Civ.P. 56 requires a defendant to make a "showing" to support its summary judgment motion, but he asserted that that showing need not always be made by evidence. 756 F.2d at 188. Judge Bork argued that though the *Celotex* defendant had offered no evidence, it had made a showing that plaintiff was unlikely to have admissible evidence on the exposure issue. In his view, this showing was sufficient to require plaintiff to produce evidence of exposure or face summary judgment.

Whether this Court affirms or reverses in *Celotex*, it should vacate and remand *Box*. The *Box* summary judgment was equally impermissible under the majority and dissenting views in *Celotex*.

1. If the Court Affirms in *Celotex*, the Decision Below Should be Summarily Reversed and Remanded

If this Court affirms in *Celotex*, *Box* must be reversed and remanded to the district court. The majority in *Box* affirmed summary judgment because it felt Ms. Box had failed to show that she would have applied for assistant manager positions had they been announced. It is undisputed, however, that A&P's motion for summary judgment offered no evidence or argument on this issue. (Apps. I, J, K.) All A&P offered was a statement in a brief to the effect that it "believes Box cannot establish a prima facie case." 772 F.2d at 1376. Hence the *Box* majority demanded that Ms. Box provide evidence on an issue as to which A&P made no evidentiary showing. This is what the majority of the District of Columbia Circuit held impermissible in *Celotex*. If the Court affirms *Celotex*, *Box* should be summarily reversed and remanded.

2. If the Court Reverses in *Celotex*, *Box* Should Be Vacated and Remanded, Since the *Box* Summary Judgment Was Impermissible Even Under the View of Judge Bork's *Celotex* Dissent

If this Court accepts Judge Bork's dissenting view in *Celotex* and reverses, it will be equally necessary to vacate and remand *Box*. For two reasons, *Box's* summary judgment is just as inconsistent with the *Celotex* dissent as with the *Celotex* majority opinion.

a. *A&P Made No Showing.* Judge Bork's *Celotex* dissent emphasizes that before a district court requires a plaintiff to produce evidence on a summary judgment motion, the defend-

ant must make a *showing*. The showing need not be through evidence, but it must be sufficient to raise a question on plaintiff's ability to prove a required part of her case. 756 F.2d at 188. A&P made no "showing" of any kind. A one-sentence statement in a brief to the effect that A&P "believes Box cannot establish a *prima facie* case" is not a "showing." It offers a district court no reason to believe that Ms. Box lacks any required evidence. Suppose, for example, that Ms. Box had moved for summary judgment with nothing more than a brief that stated, "A&P has no defense." No court would hold such a sentence to be a "showing" that required A&P to provide evidence or face summary judgment.

b. *A&P Gave Ms. Box No Notice of the Issue on Which Evidence Was Demanded of Her.* As Judge Bork's dissent emphasized, a district court cannot require a plaintiff to produce evidence on a summary judgment motion without giving her notice of the specific factual issue on which evidence is demanded. 756 F.2d at 189, 191. In *Celotex*, the plaintiff was told the precise issue she was expected to address: her husband's exposure to asbestos.

Ms. Box had no such notice, and the *Box* majority held that it need not be given. The *Box* majority held that to shift the initial burden of producing evidence from A&P to plaintiff, A&P provided adequate notice of the issue on which evidence was demanded simply by asserting in a brief that it "believes Box cannot establish a prima facie case." 772 F.2d at 1376.

This radical position is contrary not only to Judge Bork's *Celotex* dissent, but to due process. The initial burden of providing evidence on a summary judgment motion cannot be imposed on plaintiffs without specific notice of the issue on which proof is demanded. It may not be unfair to impose that burden when a defendant identifies the specific factual issue on which it challenges plaintiff to produce evidence, as defendant did in *Celotex*. But it is utterly unfair to impose that burden, as the Court of Appeals did in *Box*, when all defendant has done

is to state in a brief that plaintiff "cannot cite any facts to support [her] claim."[7] Due process requires more specific notice than that. *See, e.g., Cole* v. *State of Arkansas*, 333 U.S. 196, 201 (1948); *Russell* v. *United States*, 369 U.S. 749, 766-768 (1962); *Johnson* v. *New York, N.H. & H.R. Co.*, 344 U.S. 48, 51 (1952); *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U.S. 212, 217-218 (1947).

Specific notice is especially critical in that the parties do not always agree as to what the elements of a plaintiff's *prima facie* case are, as this case shows. Unless the defendant specifies the factual issues on which proof is demanded from plaintiff, a plaintiff is likely to omit proof on a particular element which she has no reason to believe forms part of her *prima facie* case. That happened here. As discussed below, at the time of the proceedings in the district court, there was no established requirement that Ms. Box prove in her *prima facie* case that she "would have applied" for assistant manager openings. *Box* is the first appellate opinion to impose such a requirement, and other Circuits disagree with its analysis.

In short, whether this Court affirms or reverses in *Celotex*, it should vacate and remand *Box*, for *Box* is inconsistent with both the majority and dissenting views of the *Celotex* Court of Appeals.

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[7] In this case, for example, if A&P had specifically raised the "would have applied" issue in the district court, Ms. Box could and would have filed an affidavit stating that she had been interested in assistant manager positions and would have applied for specific openings if A&P had made their existence known. Such an affidavit would have been consistent with the evidence in the record, acknowledged by the majority, that Ms. Box had shown interest in assistant manager positions.

B. The *Box* Opinion, in Conflict with Decisions of This Court and Other Courts of Appeals, Endorses Appellate Fact-Finding and Will Increase the Workload of the District Courts

The *Box* decision holds that after finding erroneous a district court's grounds for summary judgment, a court of appeals may affirm that summary judgment on factual grounds that were not specifically litigated in the district court. Because this holding will cause serious problems of judicial administration, and because it conflicts with the decisions of this Court and other Courts of Appeals, *certiorari* should be granted.

The *Box* holding presents two threats to sound judicial administration. First, it results in improper appellate fact-finding—a practice that has prompted this Court's repeated intervention in recent terms. *Pullman-Standard* v. *Swint*, 456 U.S. 273, 291-2 (1982); *Anderson* v. *City of Bessemer City, N.C.*, ___U.S. ___, 105 S.Ct. 1504, 1512 (1985). When a court of appeals affirms a summary judgment on factual grounds that have not been specifically litigated below, it is making an initial finding of fact, which should be the district court's function. Moreover, the court of appeals is making such a finding on an inappropriate record. It is not reviewing the complete evidentiary record of a litigated issue, but rather a skeletal record, compiled for a summary judgment motion that had nothing to do with the issue on which the court of appeals is making its finding.[8] Such a procedure usurps the fact-finding responsibilities of district courts. In this case, for example, the district court never had a chance to consider the factual issue resolved by the Seventh Circuit—whether Ms. Box would have applied for assistant manager vacancies had she known of them—and no factual record was built on this issue by either party.

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[8] Indeed, as noted earlier (n.4), in this case the majority not only based its finding on a skeletal record, but relied on evidence—Ms. Box's deposition—that had not been considered at all by the district court on the question of Ms. Box's *prima facie* case.

Second, the Seventh Circuit's procedure, unless condemned by this Court, will increase the burden on district courts facing summary judgment motions. If a Court of Appeals may affirm a summary judgment on factual grounds that have not been specifically raised in the district court by defendant, a plaintiff opposing a summary judgment motion will have no choice but to offer evidence and argument on every element of her case, even though defendant has not put them in issue. Under the Seventh Circuit's practice, summary judgment motions will become cluttered with evidence and arguments on issues that defendants have not raised, because prudent plaintiffs must protect themselves from the possibility that a court of appeals will affirm on a factual ground that was not raised by defendant in the district court.

Aside from the threat it poses to sound judicial administration, the decision below conflicts with this Court's 336 decisions of other Circuits. In *Fountain* v. *Filson*, 336 U.S. 681 (1949), this Court condemned appellate-level summary judgments on factual issues not specifically litigated in the district court:

> [H]ere the order was made on appeal on a new issue as to which the opposite party had no opportunity to present a defense before the trial court.
>
> * * *
>
> There was no occasion in the trial court for Mrs. Fountain to dispute the facts material to a claim that a personal obligation existed, since the only claim considered by that court on her motion for summary judgment was the claim that there was a resulting trust. When the Court of Appeals concluded that the trial court should have considered a claim for personal judgment it was error for it to deprive Mrs. Fountain of an opportunity to dispute the facts material to that claim by ordering summary judgment against her.

Fountain v. *Filson*, 336 U.S. 681, 683 (1949). *See also Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976); and *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941). The Seventh Circuit's procedure likewise conflicts with other Circuits that have held that when a court of appeals finds a summary judgment erroneous, it may not affirm that summary judgment on other factual grounds unless these factual grounds were specifically litigated in the district court. *Heirs of Fruge* v. *Blood Services*, 506 F.2d 841, 844 (5th Cir. 1975); *Mariash* v. *Morrill*, 496 F.2d 1138, 1145 (2d Cir. 1974).

By reversing the Seventh Circuit, the Court will resolve this conflict among Circuits. It will eliminate improper appellate displacement of district court fact-finding, and it will protect district courts from the needless inflation of the scope of summary judgment motions.

C. The Decision Below Conflicts With Other Circuits and With the Position of the EEOC on the Elements of a Title VII Plaintiff's *Prima Facie* Case Where an Employer Neither Announces Nor Takes Applications for the Opening in Question

The decision below conflicts with other Circuits, and with the position of the EEOC, on the elements of a Title VII *prima facie* case where an employer has filled openings without accepting applications for them or making the existence of those openings known. *Box*'s new requirement of showing that the plaintiff would have applied for a specific vacancy clashes with other Circuits' holdings, and with this Court's prior decisions. This conflict demands this Court's intervention, for as the EEOC told the Seventh Circuit, *Box*'s requirement will "seriously hamper both public and private enforcement efforts" under Title VII. (App. H.)

1. The Decision Conflicts With the Ninth and Eleventh Circuits' Holdings that the Question of "Applying" Is Irrelevant to a *Prima Facie* Case Where an Employer Takes No Applications

The Ninth and Eleventh Circuits have held that when an employer fills openings without announcing or taking applications for them, the question of applying for the job is irrelevant to a Title VII *prima facie* case. *Carmichael* v. *Birmingham Saw Works*, 738 F.2d 1126, 1132-1133 (11th Cir. 1984); *Reed* v. *Lockheed Aircraft Co.*, 613 F.2d 757, 761 (9th Cir. 1980). *Box* conflicts with these Circuits' rules by reinserting the "application" requirement in another guise. Even though an employee like Ms. Box cannot prove that she applied for jobs for which no applications were allowed, the majority requires Ms. Box to prove in her *prima facie* case that she *would have applied* for the jobs had she known about them, and to identify the specific jobs she would have applied for.

The Ninth and Eleventh Circuits are right, while *Box* is wrong. The reason is clear: the *Box* majority's "would have applied" requirement makes a Title VII plaintiff's *prima facie* case prove a fact that has nothing to do with discrimination.

The purpose of the Title VII *prima facie* case is to raise a presumption of deliberate discrimination even though direct evidence is lacking. *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253-254 (1981). When a qualified employee unsuccessfully applies for a job, the fact that she applied contributes to this presumption. It shows that the employer, specifically knowing that a qualified female (or black) employee wanted the job, decided to turn her or him down. That raises a question of why that happened, and requires explanation from the employer.

But where an employer like A&P takes *no* applications and makes it impossible for employees to express interest in specific openings, the question of applying becomes irrelevant to pro-

ving deliberate discrimination. *Carmichael* v. *Birmingham Saw Works, supra,* 738 F.2d at 1132-1133.

Since "applying" is irrelevant in a system in which no applications are taken, the *Box* opinion invents a substitute for the "application" requirement: the plaintiff is to show that she "would have applied" for a vacancy had she known about it. But such "would have applied" proof is irrelevant to proving that discrimination has occurred. Alleging that she would have applied for a vacancy sheds no light on whether A&P was actually discriminating against women. Such discrimination is proved only with facts about what the employer *did*, using a system that dispensed with applications. Ms. Box offered such facts. She produced strong statistical proof that sex played a role in how A&P picked assistant managers and other supervisors. She also offered anecdotal evidence that she and women who approached A&P about promotion to such positions were told that they were reserved for men. This proof raised a strong presumption of discrimination. Showing that Ms. Box would have applied for assistant manager positions had she known of them would have added nothing to that presumption.

In short, the majority's new "would have applied" requirement conflicts with the Ninth and Eleventh Circuits, which recognize that the issue of applying is irrelevant to the *prima facie* case when an employer takes no applications.

2. As a Means of Proving Injury, the "Would Have Applied" Requirement Is at Odds with the Fourth and Eighth Circuits.

Since it contributes nothing to proof of deliberate discrimination, the only conceivable purpose of the majority's "would have applied" requirement is to show injury. The "would have applied" requirement appears aimed at showing that Ms. Box was personally affected by A&P's unannounced

handpicking of men for supervisory positions.[9] But even as a means of proving injury, the Seventh Circuit's "would have applied" requirement conflicts with other Circuits' holdings and with common sense.

The Fourth and Eighth Circuits have held that where an employer does not post openings and does not have a formal application process, the plaintiff need only show that she informally expressed an interest in promotion to the category of position in question. That is enough to establish, *prima facie*, that he or she was affected by a discriminatory pattern of selection. *Holsey* v. *Armour & Co.*, 743 F.2d 199, 208-209 (4th Cir. 1984) ("casual inquiry" sufficient); *Paxton* v. *Union National Bank*, 688 F.2d 552, 568 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); *Easley* v. *Empire Inc.*, 757 F.2d 923, 930 (8th Cir. 1985). *And see Ferguson* v. *E.I. duPont de Nemours and Co., Inc.*, 560 F.Supp. 1172, 1192-1193 (D.Del. 1983) ("generalized expression of interest" sufficient).

The *Box* majority rejects this rule. It acknowledges that Ms. Box repeatedly indicated interest to her store manager in advancing to the assistant manager position, and that her 1976 EEOC charge complained of her failure to be promoted to

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[9] In addition to other errors, the *Box* majority erred in imposing, at the liability stage, a burden on Ms. Box to show that she had been individually injured by A&P's discriminatory policy. This was a classic "pattern or practice" case. In such a case, plaintiff's *prima facie* case at the liability stage is simply to show that "unlawful discrimination has been a regular procedure or policy followed by an employer." *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747, 772-773 (1976). At that stage, proof of injury to individual persons is expressly *not* required. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 360-361 (1977). Even the skeletal record on A&P's summary judgment motion showed that Ms. Box had strong evidence of such a discriminatory procedure. By going further, and requiring Ms. Box to offer evidence of individual injury to herself in her *prima facie* case, the *Box* majority imposed a burden that this Court holds she does not have.

assistant manager. 772 F.2d at 1377. But the majority, in conflict with the cases cited above, finds such expressions of interest in promotion to assistant manager insufficient, and makes the plaintiff engage in the hypothetical exercise of alleging she would have applied for specific, identified assistant manager openings had A&P done something it did not do—make those openings known to her.

For three reasons, the rule of the Fourth and Eighth Circuits makes sense, while the *Box* rule makes none. First, the Fourth and Eighth Circuits make a plaintiff prove injury by showing what she actually did, while the *Box* rule makes her prove injury with self-serving, conclusory statements about what she would have done. A plaintiff who shows that she repeatedly told her employer of her desire to be promoted to assistant manager has provided credible evidence, through her actions at the time, that she wanted to be an assistant manager and would have competed for assistant manager jobs if the employer's no-announcement, no-application system had not sealed off such competition. Such a plaintiff provides far stronger proof of injury than a plaintiff who, as *Box* demands, intones years after the fact that she would have applied for a particular vacancy.

Second, when Ms. Box asked her store manager for promotion to assistant manager, she did everything that could reasonably have been expected of her to obtain such a position. Because A&P did not announce or take applications for its vacancies, Ms. Box had no way at the time to indicate her interest in assistant manager jobs, other than by the actions she took. *Box* holds that a plaintiff fails to offer sufficient proof of injury even though she proves that she did "everything within [her] power to apply for employment." *Furnco Construction Co.* v. *Waters*, 438 U.S. 567, 576 (1981). This makes no sense.

Third, the *Box* rule treats females differently from males. In order to be considered for promotion on the same basis as the male clerks who were promoted, Ms. Box should have had

to do precisely what the men had to do—nothing. Instead, the *Box* rule makes her prove that she would have engaged in an act—applying for a job—that was not required of the 27 men lucky enough to be tapped by A&P for these assistant manager jobs.[10]

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[10] The Court of Appeals' "would have applied" requirement appears to be a misapplication of the *Teamsters* solution to the problem of the deterred applicant. *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977). In *Teamsters*, the employment system required applications, but the discrimination was so blatant that many blacks deemed it futile to apply. This Court held that once liability was established in the "Stage I" proceedings, such persons could recover damages in "Stage II" if they could show that they would have applied but for the employer's pervasive discrimination. 431 U.S. at 367-8.

In this circumstance, the "would have applied" requirement makes sense, because it explains why the plaintiff failed to participate in a real-life application system that all were required to use. In the *Box* case, the "would have applied" requirement makes no sense, because the employer had no application system, and males were not required to apply. There is no reason to make Ms. Box explain why she did not apply for openings when A&P did not accept applications.

Moreover, even in the "deterred applicant" case, *Teamsters* does not require the deterred applicant to identify, as *Box* does, the specific vacancy for which he would have applied. Instead, this Court noted that an employee can show that he "would have applied" simply by proving that he took general actions at the time that were consistent with the conclusion that he would have applied for the type of job in question. 431 U.S. at 371 n.58. This holding is analogous to the Fourth and Eighth Circuits' holdings that where an employer accepts no applications, an employee need only demonstrate that she expressed general interest at the time in promotion to the kind of position at issue.

As the EEOC, *amicus curiae*, told the Seventh Circuit, it is important to resolve the conflict *Box* has created. Many employers fill positions without announcing them or taking applications for them, and substantial Title VII litigation arises from this practice. This Court should grant *certiorari* to eliminate the conflict among Circuits about the *prima facie* case in this recurring situation.

CONCLUSION

For the reasons stated above, a writ of *certiorari* should be granted to review the decision of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

GEORGE F. GALLAND, JR.*
JUDSON H. MINER
PAUL STRAUSS

Attorneys for Petitioner
DAVIS, MINER, BARNHILL
& GALLAND
14 West Erie Street
Chicago, IL 60610
(312) 751-1170

*Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOANN FORD BOX,

Petitioner,

v.

A & P TEA COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT A & P TEA COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL A. WARNER*
JOHN W. POWERS
JILL A. GOLDY
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000
Attorneys for Respondent

* Counsel of Record

Pandick Midwest, Inc., Chicago • 733-6000

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Did the Court of Appeals properly exercise its appellate review authority to affirm summary judgment in favor of Defendant A & P on a ground different from that relied on by the District Court?

2. Whether the Court of Appeals properly applied the Title VII *prima facie* case standard as enunciated by this Court in *McDonnell Douglas v. Green* and its progeny.

PARTIES TO THE PROCEEDING BELOW

In addition to the parties identified in the Petition for Writ of Certiorari, Paula Brockhouse was an additional petitioner in the consolidated proceedings before the United States Court of Appeals for the Seventh Circuit (Nos. 84-1732 and 84-1733).

STATEMENT REQUIRED BY RULE 28.1

The Great Atlantic & Pacific Tea Company, Inc. has no parent company, subsidiaries (other than wholly owned subsidiaries), or affiliates. Tengelmann-Warenhandelsgesellschaft, a partnership organized under the laws of West Germany and controlled by Mr. Erivan Haub, owns beneficially and of record approximately 52.7% of the outstanding shares of the Company's common stock.

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IN THE

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JOANN FORD BOX,

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A & P TEA COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT A & P TEA COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent opposes the Petition for a Writ of Certiorari because this case does not merit review by this Court. The issues presented are not controlled by *Celotex Corp. v. Catrett*, No. 85-198, for two reasons. Unlike in *Celotex*, the defendant in this case relied upon evidence to support its summary judgment motion. Further, the issue herein is whether an appellate court, looking at a record as a whole, may affirm a judgment on independent grounds, whereas the central issue in *Celotex* is the district court's discretion in allocating burdens of proof in summary judgment proceedings. The Court of Appeals decision does not create a conflict among the circuits on that issue. Moreover, the decision below is entirely consistent with long-standing legal principles on the elements of a Title VII *prima facie* case established by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny.

COUNTERSTATEMENT OF THE CASE

Petitioner filed this Title VII lawsuit in 1979, claiming race and sex discrimination in her employment as a retail clerk in certain grocery stores within the Chicago Division of A & P Tea Company ("A & P"). A & P filed a summary judgment motion[1] seeking dismissal of Petitioner's sex discrimination claims after several years of discovery in the case. In discovery, the parties had examined documents from the administrative proceedings on Petitioner's underlying discrimination charges, and A & P had responded to interrogatories, voluminous requests for production of documents, and requests to admit. In addition, lengthy depositions were taken of Petitioner and A & P's Chicago Division Industrial Relations Manager.

In support of its motion for summary judgment, A & P presented affirmative evidence from Petitioner's deposition, her underlying EEOC charges, and related documents to show that under Petitioner's own version of the facts, accepted as true for purposes of the motion, she could not establish a Title VII violation. App. J at 9-13. The initial thrust of A & P's argument was that Petitioner had not even properly perfected her claim, because her underlying EEOC charge was limited to a race claim. When Petitioner responded with an affidavit in which she insisted that, in fact, she did check the "sex" box in the EEOC charge, A & P then argued that summary judgment on the sex claim must still be granted because all vacancies in the job she claimed she was discriminatorily denied — bookkeeper — were filled exclusively by females.

At that point, although not revealed in Petitioner's Statement of the Case herein, she was granted leave to file a sur-

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[1] A & P's motion also challenged the sex discrimination claims of Paula Brockhouse, a second plaintiff who had also brought claims of sex discrimination in a consolidated case. Although Brockhouse's claims also were dismissed on summary judgment and that judgment also was affirmed by the Court of Appeals below, Petitioner seeks review in this Court only as to her own individual claims.

reply brief, attached hereto as Respondent's Appendix. An expressed purpose of the sur-reply was to address A & P's showing that Petitioner had failed "to allege even a *prima facie* case of sex discrimination." Resp. App. at 1-2. It relied, in turn, on her previous affidavit, which indicated she had expressed a general interest in training for positions other than bookkeeper, including assistant manager jobs.[2]

The Petition herein acknowledges that in discovery Petitioner had learned of twenty-seven assistant manager positions that had been filled in A & P's Chicago Division between 1975 and 1978. Rather than identify which, if any, of these positions she was allegedly discriminatorily denied, Petitioner stated in her affidavit only that she had sought training for some position other than bookkeeper, so she could "advance, for instance, into the assistant manager position." She further argued she "had already met" the Company's no *prima facie* case argument in previous briefing on this and other motions. Resp. App. at 2. Moreover, she argued, "a finding that [she had] applied for positions other than head bookkeeper [was] not essential to her case," because "even if [she] could not point to a specific position for which a man was preferred, her relegation to a limited employment path in which she was not given a chance to compete with men [was] clearly discriminatory." Resp. App. at 4. Finally, she stated, Petitioner "need not fit her sex discrimination case into the rigid formula described by . . . A & P to state a *prima facie* case and survive a motion for summary judgment." Resp. App. at 4.

Because the district court's ruling on the summary judgment motion did not address Petitioner's alleged desire for assistant manager positions, Petitioner attempted to highlight this issue in her appeal to the Seventh Circuit. Her briefs to the

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[2] As the court below noted, Petitioner had never specifically identified in her deposition any assistant manager positions in which she was interested or which she had been denied. App. A at 8.

Court of Appeals reiterated the arguments from her district court sur-reply memorandum. Appellants' Br. at 15-18; Appellants' Reply Br. at 7-14.

The Seventh Circuit said she was wrong and held that Petitioner had failed to establish a *prima facie* case of discrimination in promotions, either to bookkeeper or to assistant manager positions. It affirmed the judgment on that basis. It found that Petitioner, as part of her *prima facie* case, was required simply to identify which specific positions she claimed were discriminatorily denied her. In recognition that A & P had not used a formal application or job posting system, the court below did not hold Petitioner to a showing of which positions she actually *had* applied for. Instead, it determined that a mere showing of the positions she "would have applied for" would be sufficient to establish a *prima facie* case in the particular factual setting here. App. A at 7-8. However, since Petitioner had failed to make even this minimal showing after four years of discovery, and none of the evidence she relied upon "suggests anything more than a vague interest in the assistant manager position," the Court of Appeals affirmed the judgment of the district court. App.A at 8.[3]

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[3] At all times material to Petitioner's claim, A & P's Chicago Division encompassed over 200 stores in three states. R. 15 at 2-3. Petitioner herself lived and worked in Kankakee and later Rockford, Illinois, approximately 90 miles from the Chicago metropolitan area where most of the stores (and presumably most of the vacancies) were located. R. 15 at 2-3; R. 168 (Box Dep.) at 6, 12, 14. Thus, specific identification of the position was critical both to the application of the *McDonnell Douglas* burden of proof formula and to the court's ability to "assess the proof in order to see whether there is a genuine need for a trial." Fed. R. Civ. P. 56, Advisory Committee note on the 1963 amendments to Rule 56(e). *See* pp. 8-13, *infra*.

ARGUMENT

I. THE *CELOTEX* DECISION IS NOT APPLICABLE TO THIS CASE AND WILL NOT CONTROL ITS DISPOSITION.

A. A & P's Motion for Summary Judgment Was Supported by Affirmative Evidence.

The *Celotex*[4] decision will not control this case. The central legal issue in *Celotex* is whether the moving party on a summary judgment motion can obtain summary judgment without making *any* affirmative evidentiary showing to support the motion. This case does not present the same question, because here A & P did exactly what the movant in *Celotex* did not do: it filed its motion after extensive discovery and supported the motion with evidence that Petitioner could not, as a matter of law, satisfy all the elements of a *prima facie* case of sex discrimination under Title VII.

More particularly, A & P cited Petitioner's own version of her claim, as stated in her EEOC charge and accompanying documents (App. J at 9-13) that she was discriminatorily denied bookkeeper positions (App. J at 12-15), along with other evidence in the record that all such positions had been filled by women. Thus, no sex case could be sustained. Petitioner fully understood the issue. Indeed, her sur-reply was for the express purpose of rebutting A & P's showing that she had failed "to allege even a *prima facie* case of sex discrimination." Apparently conceding that her sex discrimination claim could not be sustained with respect to the bookkeeper claim, Petitioner contended in her sur-reply that she was also making a claim that she was denied assistant manager posi-

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[4] *Catrett v. Johns-Manville Sales Corp.*, 756 F.2d 181 (D.C. Cir. 1985), *cert. granted sub nom., Celotex Corp. v. Catrett*, ___U.S. ___, 106 S. Ct. 342 (1985) hereinafter "*Celotex*").

tions. In turn, she cited evidence in the discovery record to support that contention. Ultimately, the Court of Appeals determined that this evidence was not sufficient, as a matter of law, to make out a *prima facie* case.

The summary judgment proceeding in this case involved the most appropriate and commonplace use of Rule 56. After extensive discovery, Defendant moved to test the legal sufficiency of Petitioner's claims based on evidence of Petitioner's own version of her claim. Petitioner responded in kind with other evidence from the discovery record.

Accordingly, this case is completely different from *Celotex* where, because the defendant made only boilerplate allegations in its motion for summary judgment, the non-moving party plaintiff was put to the entire burden of shaping the issues and evidence for summary judgment purposes.[5] Here Petitioner was saddled with no such burden and had full notice of the evidence and arguments on which A & P was relying.[6] In short, Petitioner's strained attempt to argue that *Celotex* controls this case is without merit.[7]

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[5] Interestingly, the dissenting judge in the court below did not find that the majority was wrong because of the type of deficiency cited in *Celotex*. On the contrary, the dissent here was fully satisfied that the issue was clear below and that the record was sufficiently developed. The sole basis for his dissent was that he felt the facts showed a *prima facie* case. App. A at 14.

[6] Moreover, unlike here, the defendant in *Celotex* had not received in discovery the plaintiff's version of the case upon which to rely and, in effect, was arguably using Rule 56 improperly as a discovery device. *Celotex*, 765 F.2d at 185 n. 12. This is not the issue here.

[7] For a Seventh Circuit case that does address the *Celotex* issue, *see American Nurses' Association v. State of Illinois*, ___ F.2d ___, 40 Fair Empl. Prac. Cas. (BNA) 244 (7th Cir. 1986).

B. Petitioner's Real Complaint, That The Court of Appeals Affirmed On A Ground Not Relied Upon By The District Court, Does Not Merit Review.

It is apparent that what the Petitioner is most concerned about is not the issue in *Celotex*, but that the Court of Appeals relied upon a ground not relied on by the district court. This underscores another distinction from the *Celotex* case. *Celotex* concerns the discretion accorded a district court judge to allocate burdens of proof in a summary judgment proceeding under Fed. R. Civ. P. 56. *Celotex*, 756 F.2d at 186, 187 (agreement of majority and dissent on this point). Here, in contrast, the Court of Appeals invoked appellate review principles which allowed it to affirm on another ground supported by the record. This, in turn, served an important interest in preserving the finality of the judgment. This sound but unremarkable exercise of its appellate review authority certainly does not merit this Court's attention in this case.

A court of appeals may affirm a judgment on any ground supported by the record, even if that ground was not relied on or even considered by the district court. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). It does not matter that the district court's judgment was based on erroneous grounds. *Id.* The only limitation is that the party aggrieved by the judgment must have had an opportunity below to present evidence on the issue, and to have argued it either in the lower court or on appeal. *Arlinghaus v. Ritenour*, 622 F.2d 629, 638-39 (2d Cir.), *cert. denied*, 448 U.S. 1013 (1980); *Rich v. United States Lines, Inc.*, 596 F.2d 541, 551 (3d Cir. 1979); *Paskaly v. Seale*, 506 F.2d 1209, 1211 n.4 (9th Cir. 1974). *See also Charbonnages de France v. Smith*, 597 F.2d 406, 416 n.9 (4th Cir. 1979).

This case fits squarely within those principles. As Petitioner's sur-reply memorandum shows, she was fully aware that the

issue was whether her version of the facts was sufficient, as a matter of law, to establish a *prima facie* case. The contention in the Petition that she had no notice of the issue on which evidence was demanded of her (Pet. for Cert. at 11) is disingenuous. The only surprise to which she was subjected was that the Court of Appeals did not adopt her view of the proper legal standard for establishing a Title VII *prima facie* case.[8]

Thus, notwithstanding Petitioner's strained effort to present this case as a Rule 56 due process matter, in fact the Petition seeks nothing more than a reassessment of whether the Court of Appeals properly applied the law to the facts. That is not an issue which warrants review by this Court.

II. THE TITLE VII *PRIMA FACIE* CASE STANDARD APPLIED BY THE COURT OF APPEALS IS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS.

At the time A & P's summary judgment motion was filed, Petitioner's case was simply an individual claim presenting the single question whether *Petitioner* had been discriminated

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[8] Given Petitioner's express acknowledgement of the *prima facie* case issue, the cases cited at pages 14-15 of the Petition are inapposite. Each of those cases reached the courts of appeals in a procedural posture in which no discovery on the disputed issue had been taken in the lower court, or in which there had been no prior opportunity for argument. Moreover, because the Petitioner litigated the assistant manager question in the district court to her own full satisfaction (as evidenced by her sur-reply), she cannot properly be heard to complain at this time about decisions made on an incomplete evidentiary record. *See* Pet. for Cert. at 13. Finally, Petitioner's expressed fear about burdening district courts with extraneous matters in summary judgment proceedings is gratuitous, since the grounds relied on by the Court of Appeals here all clearly were in issue — at Petitioner's instigation — in the district court. *See* Pet. for Cert. at 14.

against in obtaining promotions because of her sex.[9] In consequence, the evidentiary standards applied by the Court of Appeals properly were those appropriate to an individual Title VII claim, and as such were entirely consistent with the decisions of this Court and the other courts of appeals that have addressed the same issue.

Petitioner's attack on the *prima facie* case standard applied by the Court of Appeals is based on the fundamentally faulty premise that this was a " 'pattern and practice' case," in the nature of *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977). *See* Pet. for Cert. at 18 n.9. That same premise led Petitioner in her sur-reply memorandum, and throughout this case, to argue that broad statistics and general statements would suffice to support a *prima facie* case, while evidence showing some actual injury to her was unnecessary.

This Court first defined the elements of a Title VII *prima facie* case of discrimination in *McDonnell Douglas v. Green,* 411 U.S. 792 (1973). Identification of a specific vacancy, *i.e.,* the job that a plaintiff applied and was qualified for, is a fundamental element of the *McDonnell Douglas prima facie* case. 411 U.S. at 802. Because the purpose of such a showing is to create an inference of discrimination, *McDonnell Douglas* further recognizes that the necessary elements of a *prima facie* case may have to be adapted to fit different factual situations. 411 U.S. at 802 n.13. *See also Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 253-54 n.6 (1981).

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[9] Although Petitioner's Complaint originally sought to represent a class of other women, the Company filed the instant summary judgment motion before any class certification issues had been ruled upon, and the district court ultimately refused to certify any class of females in the case. The summary judgment motion itself only challenged Petitioner's ability to sustain her individual claim of discrimination, and that was the sole issue before the Court of Appeals.

The Court of Appeals' "would have applied" formulation was a simple adaptation of the *McDonnell Douglas* standards to fit an employment setting where no formal application process was utilized for filling positions, but where vacancies may have occurred in any of hundreds of stores, most of which were in Chicago, ninety miles from Petitioner's home and work locations. App. A. at 7. The obvious purpose was to permit a determination whether Petitioner's failure to obtain any assistant manager job was because of her sex, or was for some other nondiscriminatory reason.[10]

This Court noted in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977), that the *McDonnell Douglas* formula "demand[s] that the alleged discriminatee demonstrate at least that [her] rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute *or relative lack of qualifications* or the absence of a vacancy in the job sought." 431 U.S. at 358 n.44 (emphasis added). In the present case, it would be impossible to compare Petitioner's qualifications with those of the employees who were selected, without some identification of the specific positions in question.[11] Such comparisons are particularly significant when the opening involves a

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[10] Petitioner repeatedly suggests that the "would have applied" standard is an onerous and burdensome requirement. Petitioner contends, for example, that it requires her to "explain why she did not apply for openings" and to "prove," as part of her *prima facie* case, that she would have applied for specific positions. *See* Pet. for Cert. at 16, 20 n.10. This overstates the Seventh Circuit's holding to an unjustifiable degree: the decision required a simple identification. Moreover, in the district court Petitioner did not even assert that an identification of the positions she would have applied for was difficult or impossible, but only that it was unnecessary.

[11] As noted, here Petitioner never identified the timing or location of *any* of the twenty-seven positions potentially in issue, much less the ones she would have applied for.

managerial position, as was the case here. *See Mason v. Continental Ill. Nat. Bank,* 704 F.2d 361, 365 (7th Cir. 1983); *Christensen v. Equitable Life Assur. Society,* 767 F.2d 340, 343 (7th Cir. 1985), *cert. denied,* ___ U.S. ___, 106 S. Ct. 885 (1986). *See also Elliott v. Group Medical and Surgical Service,* 714 F.2d 556, 567 (5th Cir. 1983). Petitioner offers no reason why this type of comparison is any less necessary in her case than in all other Title VII promotion cases.

Without an identification of the specific positions Petitioner would have applied for, it also was impossible to determine her genuine interest in, and/or availability for, such positions. In *Teamsters,* this Court was unwilling to assume that all "deterred applicants" for line-driver jobs actually wanted those positions, even though line-driver jobs paid higher wages; each individual claimant therefore was required to prove an actual interest in the job. 431 U.S. at 369-70. It similarly cannot be presumed that Petitioner in this case would have been interested in all (or any of the) twenty-seven assistant manager positions.[12] As in *Teamsters,* showing merely that such positions

[12] The record in this case underscores the fallacy of such a presumption. Petitioner transferred from Kankakee to Rockford, Illinois in 1977 because she had recently married, and her husband lived in Rockford. R. 168 (Box Dep.) at 13. In early 1978, Petitioner had actually *requested a demotion* from assistant bookkeeper to cashier, because her husband was ill. R. 168 (Box Dep.) at 15. In light of these career decisions, one cannot *reasonably infer* that Petitioner would have sought any promotion that would have required her to move from her family. Indeed, when her store in Rockford closed, Petitioner declined an offer of a transfer to a job in Belvedere, Illinois (only twenty miles away), in part because it was too far from her home. R. 168 (Box Dep.) at 16-17. If Petitioner was unwilling to travel twenty miles when the choice was between continued employment or termination, it is unreasonable to assume that she would have transferred to another position in the Chicago metropolitan area.

existed shows nothing about whether Petitioner was denied any of them because of her sex.[13]

Petitioner misreads the decisions of the Fourth, Eighth, Ninth and Eleventh Circuits when she contends that they are in conflict with the decision of the Seventh Circuit below. They simply hold that in an employment setting where an employer fills positions without a formal application or job posting system, a Title VII plaintiff is relieved of the obligation to establish, as an element of his *prima facie* case, that he applied for a desired position *before the fact;* instead, other evidence of his interest in the position is sufficient.

Unlike the present case, each of the plaintiffs in those cases already had identified the specific vacancies they allegedly had been denied. Thus, the decisions cited by Petitioner did not adopt a "would have applied" standard for identifying vacancies simply because they never even had to reach the issue. *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 758 (9th Cir. 1980) (Director of Investment Relations); *Carmichael v. Birmingham Saw Works*, 738 F.2d 1126, 1132 (11th Cir. 1984) (City Sales job); *Holsey v. Armour & Co.*, 743 F.2d 199, 208

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[13] Under long-standing principles, even the evidence Petitioner relied on below — simple statistics showing the number of positions filled and vague anecdotal testimony — was insufficient to support a *prima facie* case. Her statistical sample of twenty-seven vacancies over a four-year period in some two hundred stores is too small in its own right to have any statistical significance. *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974). *Accord Soria v. Ozinga Brothers, Inc.*, 704 F.2d 990, 994-97 (7th Cir. 1983). Moreover, this Court long has recognized that statistics on the treatment of others "may not in and of themselves be controlling as to an individualized . . . decision particularly in the presence of an otherwise justifiable reason for [the decision]." *McDonnell Douglas v. Green*, 411 U.S. 792, 805 n.19 (1973). Thus, the actual decision in question must be examined. Obviously, that cannot be done until the decision has been identified. Consistent with *McDonnell Douglas*, the Court of Appeals' standard is a straightforward vehicle for making such an identification.

(4th Cir. 1984), *cert. denied,* ____U.S.____, 105 S. Ct. 1395 (1985) (foreman vacancy and sales position); *Easley v. Empire, Inc.,* 757 F.2d 923, 925 (8th Cir. 1985) (retail manager position); *Paxton v. Union National Bank,* 688 F.2d 552, 568 (8th Cir. 1982), *cert. denied,* 460 U.S. 1083 (1983) (lead control clerk). Thus, far from holding it unnecessary for a Title VII plaintiff to identify the actual vacancies which she might have sought, the Fourth, Eighth, Ninth and Eleventh Circuit decisions are consistent with the Court of Appeals' decision herein in recognizing that the *prima* facie case principles of *McDonnell Douglas* can only be applied after plaintiffs have identified vacancies which they desired and for which they were qualified.

Indeed, in deciding a related hiring issue in *Carmichael,* the Eleventh Circuit took an even stronger position than the Court of Appeals below. Consistent with *McDonnell Douglas,* it expressly rejected the plaintiff's contention that statistical evidence showing classwide discrimination was sufficient to make out a *prima facie* case in an individual case. To the contrary, the plaintiff was required to show that he was the victim of an identifiable act of discrimination by showing a specific job he had been denied. 738 F.2d at 1131-132.

For the foregoing reasons, the Seventh Circuit's "would have applied" formulation is a proper application of the *McDonnell Douglas* standards for a *prima facie* case and creates no conflict among the circuits requiring resolution by this Court.

CONCLUSION

In this case, A & P filed a summary judgment motion at the most appropriate and typical juncture of a law suit — after an evidentiary record had been built through discovery. In response, Petitioner elected to rely on limited, and in the circumstances meaningless, numerical data concerning assistant manager vacancies, without ever identifying the specifics of such vacancies, much less which vacancies she allegedly desired. Because neither the trial court nor the appellate court found her argument persuasive, she now seeks to bootstrap her claims to another summary judgment case in which this Court has granted *certiorari* to consider a question of law which has no application to the instant case.

Just because this Court has granted *certiorari* in one summary judgment case does not mean that every summary judgment case can or should be reviewed by this Court. Given the commonplace nature of the summary judgment proceedings here, if *certiorari* is granted in this case, there are hundreds, if not thousands, of summary judgment cases which this Court must consider. Unlike *Celotex*, this case was briefed and argued in the conventional manner, and the court below applied legal standards that were both correct and suitable to the facts of the case.

The Petition neither raises vital questions of federal law nor does it involve conflicting decisions among the courts of appeals. Accordingly, and for all the foregoing reasons herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL A. WARNER*
JOHN W. POWERS
JILL A. GOLDY
SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Suite 4200
Chicago, Illinois 60603
(312) 346-8000
Attorneys for Respondent

* Counsel of Record

RESPONDENT'S APPENDIX

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

VARNADO CHAFFEE, et al., *Plaintiffs,* *vs.* A & P TEA COMPANY, et al., *Defendants.*	No. 79 C 2735
WILLIE J. WEST, et al., *Plaintiffs,* *vs.* A & P TEA COMPANY, et al., *Defendants.*	No. 79 C 3625
WILLIAM R. WEST, *Plaintiff,* *vs.* THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., *Defendant.*	No. 79 C 4332
JoANN FORD BOX, et al., *Plaintiffs,* *vs.* A & P TEA COMPANY, *Defendant.*	No. 79 C 4359 Judge Joel M. Flaum

PLAINTIFFS' SUR-REPLY MEMORANDUM IN OPPOSITION TO SUMMARY JUDGMENT ON THE SEX DISCRIMINATION CLAIM OF JoANN FORD BOX

As plaintiffs understand it, defendant A & P's argument for summary judgment on the sex discrimination claim of JoAnn

Ford Box is that: (1) The only job to which Box ever sought a promotion was that of head book-keeper; (2) all the head book-keeper positions which she knew of and for which she sought a promotion were filled by women; and (3) hence Box never lost to a man in head-on competition for a promotion and therefore has failed to allege even a *prima facie* case of sex discrimination.

Plaintiffs believed that they had already met this argument in briefing on the outstanding Motion for Class Certification and Motions for Summary Judgment. But the issue may have been lost in the variety of arguments presented to the Court.

The facts are these. A & P's personnel system operates without standards, without a formal bidding process, and without a formal application process. Employees do not compete head-to-head for promotions in a formalized system. Rather, employees are hand-picked for promotion by their supervisors—and promoted employees may be transferred to different stores or new districts to fill these positions. Thus, employees compete with a wide range of other A & P employees in the Chicago Division for a variety of possible positions, many of which they may never know are available. See Defendant's Answers to Plaintiffs' Interrogatories Nos. 3(b), 3(c), 4(f), 9(d) and 9(h); Deposition of John Rogers pp. 166-168, 176-184, 187-189; Paula Brockhouse, pp. 5, 10, 34, 40.

Within this subjective system, plaintiffs allege that women are virtually locked into the clerk-bookkeeper employment path. The facts supporting this conclusion are fully described in plaintiffs' briefs on class certification and in opposition to defendant's Motions for Summary Judgment.

Plaintiff JoAnn Box is a black woman. Her claims relate directly to the employment practices above-described. As a black person, Ms. Box found herself at a disadvantage in competing with white women for jobs in the narrow promotion

path usually held by women. She expected that A & P would consider her for a book-keeper position—that, after all, was the position traditionally filled by women—and found to her dismay that she always lost to whites. Thus, as defendants point out, her EEOC charges and other documents refer in large part to the preference given to white women in competition for the book-keeper position.

But defendant A & P misstates the facts when it suggests that Box limited her promotion requests to the book-keeper position. As she clearly states in paragraph 5 of her Affidavit (attached to Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary Judgment) when Box found out that she would not receive book-keeper training, she asked for training for some other position, such as assistant manager. She was told that it was the Company's position to usually promote women only to the book-keeper position.[1]

Thus A & P's argument is mistaken for the following reasons: (1) Box did not limit herself to application for promotion to the book-keeper position. She asked to be trained for promotion to other positions and received neither training nor a promotion; (2) Box did not lose only in competition with white women, limited to her store and limited to the book-keeper position. Given A & P's subjective personnel system and its practice of moving promoted employees between stores, Box lost in competition throughout the Chicago Division for jobs filled traditionally by men; (3) Box was subject to a pattern of discriminatory behavior that does not fit the model of head-on competition that A & P imagines existed. Rather, she was relegated to a system in which, for the most part, women were not even given a chance to compete with men.

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[1] In a hand-written note to her EEOC charge (Exhibit A, attached to plaintiffs earlier Memorandum) Box stated that she had been passed over for promotion to the Assistant Manager position.

In any event, a finding that Ms. Box applied for positions other than head book-keeper is not essential to her case. In a subjective system in which employees are hand-picked for promotion, Box need not show that she made a formal application to complain of discriminatory decision-making. *Simon* v. *Honeywell, Inc.*, 27 FEP Cases 73, 74 n. 3 (5th Cir. 1981). And even if Box could not point to a specific position for which a man was preferred, her relegation to a limited employment path in which she was not given a chance to compete with men is clearly discriminatory. *Willis* v. *Chicago Extruded Metals Corp.*, 375 F.Supp. 362 (N.D. Ill. 1974); *Hardy* v. *Porter*, 26 FEP Cases 1260 (5th Cir. 1980). She need not fit her sex discrimination case into the rigid formula described by defendant A & P to state a *prima facie* case and survive a motion for summary judgment. *Stanojev* v. *Ebasco Services, Inc.*, 643 F.2d 914, 920-921 (2d Cir. 1981); *McCorstin* v. *United States Steel Corp.*, 621 F.2d 749, 752-755 (5th Cir. 1980).

Defendant's argument is simply wrong. There are a series of undetermined questions of fact involved in Box's claim of sex discrimination. In these circumstances summary judgment should not be granted. *Abraham* v. *Graphic Arts Int'l. Union*, 660 F.2d 811 (D.C. Cir. 1981).

Respectfully submitted,

/s/ PAUL STRAUSS
One of the Attorneys
for Plaintiffs

DAVIS, MINER, BARNHILL
& GALLAND, CHTD.
14 West Erie St.
Chicago, IL 60610
(312) 751-1170

85-1353

Supreme Court, U.S.
FILED
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOANN FORD BOX,

Petitioner,

v.

A&P TEA COMPANY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE F. GALLAND, JR.*
JUDSON H. MINER
PAUL L. STRAUSS

DAVIS, MINER, BARNHILL
& GALLAND
14 West Erie Street
Chicago, IL 60610
(312) 751-1170
Counsel for Petitioner
JoAnn Ford Box

*Counsel of Record

Pandick Midwest, Inc., Chicago • 733-6000

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 84-1732, 84-1733

JOANN FORD BOX,

Plaintiff-Appellant,

v.

A&P TEA COMPANY,

Defendant-Appellee.

PAULA BROCKHOUSE,

Plaintiff-Appellant,

v.

A&P TEA COMPANY, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL 320 and INTERNATIONAL BROTHERHOOD OF AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA,

Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 79 C 4359, 79 C 3625—**Charles P. Kocoras**, *Judge*.

ARGUED FEBRUARY 15, 1985—DECIDED SEPTEMBER 5, 1985

Before WOOD and POSNER, *Circuit Judges*, and SWYGERT, *Senior Circuit Judge*.

WOOD, *Circuit Judge*. Plaintiffs Joann Ford Box and Paula Brockhouse, two former A&P Tea Company ("A&P") cashiers, appeal from the summary judgments entered against their sex discrimination claims. Box contends that A&P discriminated against her in promotions and training while Brockhouse, who admits A&P

disciplined her five times in the nine months prior to her discharge, argues that men were not disciplined for similar conduct. We affirm both summary judgments.[1]

I.

Joann Ford Box worked for A&P as a retail clerk-cashier from July, 1965 to July, 1978. In the present lawsuit, Box alleges that A&P discriminated against her both because of her race and because of her sex. Box claims that A&P refused to promote her to bookkeeper or to give her training for that position because she is black. Box further claims that A&P did not promote her to assistant manager or to another management position because of her sex. In her affidavit submitted in opposition to the defendant's motion for summary judgment, Box stated

> When I worked at A&P's store on East Court Street in Kankakee, for instance, I continually asked for bookkeeper training. Eventually my store manager told me that A&P's bookkeeping school had closed. I told him that, in that case, I wanted to receive training for some other position so I could advance, for instance, into the assistant manager position. He said that he didn't think that would be possible: it was the Company's policy to usually promote women only to the bookkeeper position, he told me.

---

[1] At oral argument, this court questioned whether the summary judgment on Box's sex discrimination claim could be appealed under Rule 54(b) when her race discrimination claim remained pending in the district court. *See Parks v. Pavkovic*, 753 F.2d 1397, 1401 (7th Cir. 1985) (district court does not have carte blanche to certify an order for immediate appeal under Rule 54(b)). Since oral argument the parties have settled the race discrimination claim and we therefore do not address the Rule 54(b) issue.

A&P moved for summary judgment on Box's sex discrimination claim on the grounds that Box failed to raise a claim of sex discrimination in her complaint to the Equal Employment Opportunity Commission ("EEOC") and that all persons who received the bookkeeper jobs Box claimed she was denied were female. The district court granted summary judgment for both reasons.[2] First, the court agreed with A&P that "there [was] reason to doubt whether Box ever properly presented a specific charge of sex discrimination to the EEOC." The district court thought the second reason, that all vacancies in the bookkeeper position Box sought were filled by other women, was a more compelling reason for granting summary judgment. On appeal, Box argues that the first ground is erroneous because on a motion for summary judgment the district court must view the evidence in the light most favorable to the non-moving party. The second ground is wrong, the plaintiff claims, because the evidence submitted to the court demonstrated that Box was complaining not only of discrimination in bookkeeper promotions but also of discrimination in promotions to assistant manager positions.

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories, admissions, and affidavits "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Both the district court and the appellate court must view the record and any reasonable inferences drawn there-

---

[2] A&P argues that, in granting summary judgment, the district court relied only on the second ground and that therefore the question whether Box properly raised her sex discrimination claim to the EEOC is not at issue on appeal. Appellee's Brief at 15 n.6. The clear language of the district court's order reveals that that court based its decision on both grounds and we therefore consider both as possible grounds for affirming the district court

from in the light most favorable to the non-moving party. *See Munson v. Friske*, 754 F.2d 683, 690 (7th Cir. 1985); *Hermes v. Hein*, 742 F.2d 350, 353 (7th Cir. 1984).

A plaintiff can bring a Title VII action in federal court only for discrimination "like or reasonably related" to the conduct identified by the plaintiff in her EEOC complaint. *See Jenkins v. Blue Cross Mutual Hospital Insurance, Inc.*, 538 F.2d 164, 167 (7th Cir.) (en banc), *cert. denied*, 429 U.S. 986 (1976). In *Jenkins*, we held that a plaintiff who checked the race but not the sex discrimination box on the EEOC form could nonetheless bring an action for sex discrimination because the factual allegations in her EEOC charge fairly raised claims of both sex and race discrimination. 538 F.2d at 169; *see Patterson v. General Motors Corp.*, 631 F.2d 476, 483 (7th Cir. 1980), *cert. denied*, 451 U.S. 914 (1981).

In the present case, the typed factual charge discusses Box's claim of race discrimination and does not suggest a sex discrimination claim. *See Carrillo v. Illinois Bell Telephone Co.*, 538 F. Supp. 793, 798 (N.D. Ill. 1982). Nonetheless, since we must view the evidence in the light most favorable to the non-moving party, we accept as true Box's affidavit statement that, after a friend had typed the complaint but before Box submitted it to the EEOC, Box checked the "sex" box on the EEOC form and wrote at the bottom "There had been assistant manager promotion[s] with less seniority than myself." Without these handwritten additions, Box's sex discrimination case would clearly lie outside the parameters of her EEOC complaint. *See Clark v. Chrysler Corp.*, 673 F.2d 921, 931 (7th Cir.), *cert. denied*, 459 U.S. 873 (1982). We need not, and do not, decide whether a checkmark of the sex discrimination box, by itself, is sufficient to raise a sex discrimination claim in an EEOC charge. Here Box made the checkmark in the "sex" box and the handwritten statement about the promotions to assistant manager—a position other evidence shows to be held almost exclusively by men; in addition, she stated in an EEOC questionnaire

that she was not promoted because she was black and because she was a female. Taken together, these actions preclude summary judgment on the ground that Box failed to present the sex discrimination claim to the EEOC.

The district court also held that A&P was entitled to summary judgment because all the bookkeeper promotions went to women. Were Box's suit based only on A&P's refusal to promote her to bookkeeper, we would agree that Box could not maintain a sex discrimination claim. But the plaintiff argued to the district court that A&P also discriminated against her on the basis of sex by not training her for or promoting her to an assistant manager position. She also submitted evidence which, viewed in the light most favorable to her, shows that she complained about the assistant manager promotions in her EEOC charge and that, in the Chicago area, A&P promoted twenty-seven male but no female grocery clerks to assistant manager from 1975 to 1978. Since the district court did not discuss the assistant manager promotions in granting summary judgment and the reason given by that court does not address this issue, the fact that women received all bookkeeper promotions does not justify the summary judgment for A&P on Box's sex discrimination claim.

A&P argues that Box's sex discrimination claim cannot withstand a motion for summary judgment because Box offered no evidence that she had applied for an assistant manager position or had identified a specific vacancy for which she was considered or should have been considered. The plaintiff counters that this court should not address the merits of these arguments because the defendant makes them for the first time on appeal.

On appeal of a summary judgment, the appellate court can usually consider only those matters that were presented to the trial court. *See Frank C. Bailey Enterprises, Inc. v. Cargill, Inc.*, 582 F.2d 333, 334 (5th Cir.

1978). True, we may affirm a summary judgment on any ground that finds support in the record, *see United States v. Winthrop Towers*, 628 F.2d 1028, 1037 (7th Cir. 1980); *Miller v. Gateway Transportation Co.*, 616 F.2d 272, 275 n.7 (7th Cir. 1980), but the ground must have been adequately presented in the trial court so that the non-moving party had an opportunity to submit affidavits or other evidence and contest the issue. *See Charbonnages de France v. Smith*, 597 F.2d 406, 416 n.9 (4th Cir. 1979); *see also Arlinghaus v. Ritenour*, 622 F.2d 629, 638 (2d Cir.), *cert. denied*, 449 U.S. 1013 (1980). *But see Paskaly v. Seale*, 506 F.2d 1209, 1211 n.4 (9th Cir. 1974) (appellate court can affirm on any ground supported by the record and discussed in the appellate court briefs). Analogously, we may affirm a summary judgment on a ground not raised in the trial court if the grounds asserted in the trial court necessarily encompass the ground asserted on appeal. *See Hoffa v. Fitzsimmons*, 673 F.2d 1345, 1362 (D.C. Cir. 1982).

In the district court, A&P argued in its reply memorandum that Box could not "cite any facts to support the claim" of sex discrimination; A&P cited a section of its initial memorandum that included the statement "when the undisputed facts which emerge from a plaintiff's deposition show that she cannot show a *prima facie* case . . ., summary judgment is appropriate." This argument, although not made as elaborately as the two arguments relied on by the district court in granting the motion for summary judgment, gave Box a fair opportunity to submit evidence showing that she could establish a prima facie case. *See SEC v. Southwest Coal & Energy Co.*, 624 F.2d 1312, 1317 (5th Cir. 1980); *Rich v. United States Lines, Inc.*, 596 F.2d 541, 551 (3d Cir. 1979). Since A&P's arguments that Box never applied for an assistant manager position and never identified which position she thinks she was discriminatorily denied are merely more particularized arguments why A&P believes Box cannot

establish a prima facie case,[3] we will consider the merits of these arguments.

Box's deposition testimony establishes that she never formally applied for a specific assistant manager position. If A&P had a formal system of posting job openings and allowing employees to apply for them, Box's failure to apply for an assistant manager position would prevent her from establishing a prima facie case. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *but see International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 367 (1977) (no need to apply if the discriminatory practices "had been so successful as totally to deter job applications from members of minority groups"). But A&P had no system to ensure that all interested employees could apply for a job. The plaintiff submitted evidence, which A&P apparently does not dispute, that A&P store managers promoted employees to assistant manager without asking for applications or posting the opening. When an employer uses a promotion system in which employees do not apply for promotions but rather are sought out by managers, the application requirement of the prima facie case is loosened somewhat. *See Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 761 (9th Cir. 1980); *Rodgers v. Peninsular Steel Co.*, 542 F. Supp. 1215, 1219-20 (N.D. Ohio 1982). In this situation, the

[3] In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), the Supreme Court held that a plaintiff could establish a prima facie case of discrimination by showing (i) that she is a member of a protected group; (ii) that she applied and was qualified for a job for which the employer was seeking applicants; (iii) that she was rejected despite her qualifications; and (iv) that, after her rejection, the position remained open and the employer continued to seek applicants with similar qualifications. *See also Mason v. Continental Illinois National Bank*, 704 F.2d 361, 365-66 (7th Cir. 1983) (promotions to management positions). In arguing that Box never applied for an assistant manager position, A&P is focusing on the second element of the *McDonnell Douglas* approach.

plaintiff can establish the application element of a prima facie case by showing that, had she known of an assistant manager opening, she would have applied. *See Rodgers*, 542 F. Supp. at 1220.

Box failed to offer evidence showing that, had she known of an opening for an assistant manager, she would have applied. Only three statements in the entire record lend any support to Box's claim. First, Box wrote on her EEOC complaint that individuals with less seniority had been promoted to assistant manager. In her deposition, Box stated that she had asked her store manager for training "[t]o move up, in order to make more money, bookkeeper, assistant manager, whatever." Third, Box stated in her affidavit that she had told her store manager that she "wanted to receive training for some other position so [she] could advance, for instance, into the assistant manager position."

None of these statements suggests anything more than a vague interest in the assistant manager position; indeed, the two most recent statements (the deposition and the affidavit) refer to the assistant manager position only as an example of the type of promotion in which Box might be interested. Although, as we held above, a non-applicant plaintiff can establish a prima facie case if the employer did not solicit applications, such a plaintiff must show what positions she would have applied for had she known of the openings. The plaintiff has submitted evidence that an A&P employee could be promoted to assistant manager in any of the Chicago division stores and that A&P promoted twenty-seven male grocery clerks to assistant manager positions in A&P's Chicago division between 1975 and 1978. But, after four years of discovery, Box has failed to identify for which of these twenty-seven positions she would have applied. A motion for summary judgment requires the court to view the evidence in the light most favorable to the non-moving party and to draw all reasonable inferences therefrom,

but this procedural context neither requires nor permits a court to speculate what the plaintiff would have done. *Posey v. Skyline Corp.*, 702 F.2d 102, 111 (7th Cir.), *cert. denied*, 104 S. Ct. 392 (1983). Since the uncontradicted evidence in the record reveals that Box never applied for a promotion to assistant manager, she needed to set forth specific facts showing that she could nonetheless establish a prima facie case. She needed to do more than show she had a general interest in obtaining some job other than the one she had. This is a close case, but we hold that the three statements of general interest were not enough and we therefore affirm the summary judgment for A&P.

II.

Paula Brockhouse worked as a cashier-checker at an A&P store in Jacksonville, Illinois from November, 1970 to November, 1972 and from August, 1974 to August, 1978. A&P fired her on August 28, 1978 after she had a $9.50 overage in her cash drawer. Brockhouse admitted in her deposition that prior to this overage she had received warnings in December, 1977 and March, April, and August, 1978.

The district court granted summary judgment on Brockhouse's sex discrimination claim because "she . . . presented no specific, concrete facts demonstrating that her discharge was motivated by her sex rather than by her five admitted errors, as a cashier, in the handling of her employer's cash." We agree. Under the *McDonnell Douglas* framework,

> [t]he plaintiff [first] has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a pre-

> ponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 252-53 (1981) (citations omitted). We need not decide whether Brockhouse submitted evidence showing that she could make a prima facie case because, by offering uncontradicted proof of Brockhouse's disciplinary record, A&P has articulated a legitimate, nondiscriminatory reason for the discharge. *See Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1219 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981). Thus our focus is on the third step in the *McDonnell Douglas* approach: whether the proffered legitimate reason for Brockhouse's discharge was pretextual. *See Klein v. Trustees of Indiana University*, 766 F.2d 275, 282 (7th Cir. 1985).

As a general principle, questions of motive and intent are inappropriate for summary judgment. *See Cedillo v. Int'l Ass'n of Bridge & Structural Iron Workers*, 603 F.2d 7, 11 (7th Cir. 1979). Consequently, a defendant in a discrimination case is not entitled to summary judgment if the plaintiff submits evidence from which a court can reasonably infer that the articulated legitimate reason is, in fact, a pretext for discrimination. *See Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1411-13 (10th Cir. 1984); *Gifford v. Atchison, Topeka and Santa Fe Railway*, 685 F.2d 1149, 1156 (9th Cir. 1982). But a general principle is not a universal rule, and a district court should grant summary judgment if, viewed in the light most favorable to the plaintiff, the evidence fails to demonstrate a genuine issue of material fact as to pretext. *See Parker v. Federal National Mortgage Association*, 741 F.2d 975, 981 (7th Cir. 1984); *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983).

In opposition to A&P's motion for summary judgment, Brockhouse relied on her deposition testimony and

her affidavit, which stated that (1) men acting as cashiers "were not subject to the disciplinary actions taken against female employees," (2) Don Howard, the store manager who fired Brockhouse, "told the store employees that if the males acting as cashiers had cash shortages the shortages would be absorbed by the office," and (3) Lance Gardner, a male employee at the store, had several cash shortages while she was at the store but was not disciplined. She also submitted statistical evidence to show that in A&P stores the management positions were almost always held by men.

Brockhouse's statements about how A&P treated men acting as cashiers differently than women cashiers does not preclude summary judgment because the statements do not comply with Federal Rule of Civil Procedure 56(e). That rule states that affidavits must be based on personal knowledge, must set forth such facts as would be admissible in evidence, and must "show affirmatively that the affiant is competent to testify" about those facts. Fed. R. Civ. P. 56(e); *see Pfeil v. Rogers*, 757 F.2d 850, 860 (7th Cir. 1985). Nothing in Brockhouse's affidavits suggests, let alone affirmatively shows, that Brockhouse had personal knowledge of these facts and was competent to testify to them. As the district court correctly noted, "[c]onjecture, speculation, references to matters outside the [affiant's] personal knowledge, conclusory statements and bare assertions of the general truth of a particular matter will not suffice to withstand a properly supported motion for summary judgment."[4] *See Korf v. Ball State University*,

[4] The plaintiff argues that the district court should have told her if the reason for summary judgment was a deficiency in her affidavit. Reviewing the transcript of the proceedings, however, we think the district court clearly indicated that Brockhouse's affidavit did not set forth the type of evidence needed to show a genuine issue of material fact. In addition to the statement quoted above, the district court also stated that Brockhouse "presented no *specific, concrete* facts demonstrating that her discharge was motivated by her sex rather than by her five admitted errors as a cashier." (Emphasis added.)

726 F.2d 1222, 1227 (7th Cir. 1984); *Patterson*, 631 F.2d at 482; *Durovic v. Palmer*, 342 F.2d 634, 637 (7th Cir.) (en banc), *cert. denied*, 382 U.S. 820 (1965); *United States v. Wade*, 577 F. Supp. 1326, 1331 (E.D. Pa. 1983).

Brockhouse's statement about Lance Gardner, when viewed together with her deposition testimony,[5] comes closest to satisfying Rule 56(e). But even if it did satisfy the rule, this statement fails to create a genuine issue of material fact. Brockhouse referred to Gardner as "a male employee," not as a male cashier. Brockhouse stated in her deposition that male employees at the Jacksonville A&P usually stocked shelves or bagged groceries and would only operate a cash register "once in awhile." She named only Melvin Eiling as a man who cashiered a lot. Although an issue whether two employees are similarly situated is normally fact specific, *see Brown*, 746 F.2d at 1412, here the only reasonable inference is that Gardner did not cashier very often. Brockhouse also stated in her deposition that the man whom A&P did not discipline was a new employee. Evidence that A&P disciplined Brockhouse, an experienced, full-time cashier, for cash shortages but did

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[5] In her deposition, Brockhouse referred to a new male employee who had not been disciplined for a cash shortage. She contends in her reply brief to this court that Lance Gardner is the individual she referred to in her deposition. Of course arguments in briefs are not evidence and cannot establish the unnamed employee's identity. Nonetheless, in her deposition Brockhouse cited no other example of A&P's failure to discipline male employees and she named no other male employees in her affidavit. Viewing this evidence in the light most favorable to Brockhouse, Gardner is the unnamed male employee Brockhouse referred to in her deposition. The deposition testimony also yields a reasonable inference that Don Howard was the manager who failed to discipline Gardner. But the deposition testimony does not cure the affidavit's failure to state that Brockhouse had personal knowledge of the incident. In fact, the deposition testimony suggests that Brockhouse learned the information from a neighbor.

not discipline a new employee who only occasionally operated a cash register does not create a genuine issue of fact as to pretext.

At her deposition Brockhouse stated that she never saw Don Howard discipline a man. This general statement is not enough to avoid summary judgment; she needed to show both that a male had committed a *comparable* offense and that Howard had failed to discipline him. The burden of producing evidence sufficient to resist a summary judgment motion is not onerous. *See Klein*, 766 F.2d at 282. In the present case, Brockhouse had to produce evidence of *specific* facts that, viewed in the light most favorable to her, supported a reasonable inference that the reason given for her discharge was a pretext. *See Posey*, 702 F.2d at 105-06; *see also Sweat v. Miller Brewing Co.*, 708 F.2d 655, 656 (11th Cir. 1983) (affidavit set out specific facts). A motion for summary judgment requires the court to consider only reasonable inferences, not every conceivable inference. *See Hermes*, 742 F.2d at 353; *Parker*, 741 F.2d at 980.

The plaintiff also argues that her statistical evidence precludes a summary judgment. A plaintiff may submit probative statistical evidence to show that the employer's proffered reason for the employment decision was a pretext for discrimination. *See Rodriguez v. Board of Education of Eastchester Union Free School District*, 620 F.2d 362, 367 (2d Cir. 1980). In the present case, the plaintiff relies on statistics showing that A&P management positions tended to be held by men and that A&P usually promoted men to management positions. Although this statistical evidence certainly has relevance for a claim of discrimination in promotions, it has little value for a claim that an employer discriminated in discipline. In a discipline or discharge case, relevant statistics would show that an employer disciplined or discharged women at a significantly higher rate than it disciplined or discharged men. *See Coates v. Johnson & Johnson*, 756 F.2d 524, 545

(7th Cir. 1985). The statistics submitted by Brockhouse therefore fail to create a genuine issue of fact whether the reason given for Brockhouse's discharge was a pretext.

III.

We affirm the summary judgments on both claims.[6]

SWYGERT, *Senior Circuit Judge*, dissenting. I would reverse both orders of summary judgement. Box and Brockhouse have satisfied their duty under Fed.R.Civ.P. 56(e) to go beyond bare allegations of sex discrimination and to come forward with "specific facts showing that there is a genuine issue for trial."

The majority reasons that summary judgement against Box's sex discrimination is appropriate because she fails to come forward with specific facts that indicate she can establish one element of a prima facie case of disparate treatment with respect to promotion: that she applied for an available position. The majority acknowledges that Box's deposition and affidavit tend to establish that she repeatedly requested training for and promotion to any position above cashier, including that of assistant manager.

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[6] Judge Swygert's dissent ably points out the other side of these close cases. In his dissent, however, Judge Swygert suggests that summary judgment on Brockhouse's claim was also erroneous because Brockhouse's complaint alleged discrimination in job assignment, promotion, and transfer policies. In her appeal Brockhouse argued only the discipline issue, apparently abandoning her claims of discrimination in other areas of employment. *See Publishers Resource, Inc. v. Walker-Davis Publications, Inc.*, 762 F.2d 557, 560 (7th Cir. 1985) (issue not raised in initial appellate brief is not properly presented for review).

Perhaps this indicates, as the majority believes, that Box's interest specifically in the assistant manager position was "vague," and therefore not a bona fide application for employment. On the other hand, Box's desire for *any* kind of promotion may also be indicative of the pervasiveness of discrimination at A&P and the desperation that is bred when an employer channels the vast majority of its female employees into low-paying jobs like that of cashier and offers no formal system of promotion. *See Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 761-62 (9th Cir. 1980) (no need to show that plaintiff applied for promotion where such an application would be futile). It is enough that Box has gone beyond her pleadings to show some evidence indicating that she requested promotion to assistant manager. *Cf. Munson v. Friske*, 754 F.2d 683, 690 (7th Cir. 1985) (summary judgment on questions of motive and intent not proper unless party resisting motion "presents no indications of motive and intent supportive of his position").

The majority also reasons that Box must show which one of the twenty-seven promotions to assistant manager granted to others during her tenure she desired. In other words, it would be unlawful to deny Box promotion on the basis of sex in one specific instance; but it was entirely appropriate to pass her over for promotion for the same impermissible reason twenty-seven times. Suffice to say that Box was interested in all twenty-seven promotions and was denied each one. Furthermore, the record evidence tends to show that an employee at A&P simply did not apply to any specific promotion at any specific store. Rather, an employee was "noticed" by supervisory personnel who toured the stores and was then approached when an assistant manager position became available somewhere in the metropolitan area. *See* Appellant's Appendix at 206, 209-10, 214 (reprinting deposition of John Rogers).

As for Brockhouse, the majority finds summary judgment appropriate because of her failure to come forward

with specific facts to show that her discharge for cash overages was pretextual. Even if this is true, summary judgment is still improper because Brockhouse does not confine her sex discrimination claims to the circumstances surrounding her discharge. Like Box, Brockhouse alleges that A&P had "limited the job opportunities available to women through discrimination in terms of job assignment, promotion, and transfer policies" throughout her tenure. Appellant's Appendix at 30 (reprinting first amended complaint of Brockhouse). According to her deposition, Brockhouse requested reassignment to *any* higher position with longer hours, A&P had no formal application system, and A&P promoted a male stockman to assistant manager in her store. Appellant's Appendix at 80, 99-100. Thus, even if Brockhouse's discriminatory discharge claim is unsupported, her claim of discriminatory denial of promotion during the years prior to her discharge is supported by sufficient facts to survive a summary judgment motion.

In any event, I disagree with the majority's decision to dismiss Brockhouse's claim of pretextual discharge. Brockhouse's theory of recovery is that A&P tended to subject women to harsher discipline than men. She cites as an example A&P's failure to discipline Lance Gardner, a male employee, for the same kind of cash discrepancies. The majority reasons, however, that Gardner is not a similarly situated employee because he did not work full-time as a cashier. Yet that is precisely the point. Brockhouse testifies in her deposition that, with one exception, there were no full-time male cashiers in her store. Appellant's Appendix at 86-87. The position was considered a female job, and men were channeled into other, more remunerative jobs. Thus, in the Chicago metropolitan area, 820 of the 892 utility clerks were male, 90 of the 97 dairy heads were male, 139 of the 139 produce heads were male, 180 of the 183 assistant managers were male, and 132 of the 137 store managers were male. Appellant's Appendix at 132 (reprinting A&P documents). Generally,

women became "grocery clerks" or "deli clerks." *See id.* The one supervisory position dominated by women was that of head cashier. *See id.*

In short, comparisons between similarly situated employees of the opposite sex are difficult only because of A&P's practice of segregating jobs by sex. Guidance out of this quandary can be found in the statute itself. The statute states that "[i]t shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(2) (1982). Thus, the statute prohibits in sweeping terms segregation by sex that adversely affects the individual employee. It says nothing about "similarly situated" employees or the elements of a prima facie case; such concepts are judicially created tools of analysis, not the ends of the statute. *See Jayasinghe v. Bethlehem Steel Corp.*, 760 F.2d 132, 136 (7th Cir. 1985). Where a peculiar set of facts renders use of one of these tools inapt, the tool, not the statute, must give way. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13 (1973) (elements of prima facie proof may vary in different settings).

Where a plaintiff can point to specific evidence of sexual segregation and where the only comparisons between treatment of the different sexes possible under the circumstances indicate disparate treatment, then a plaintiff is entitled to at least a trial on the merits. Substantial anecdotal and statistical evidence supports Brockhouse's claim of sexual segregation, and the comparison between her and a part-time male cashier indicates that she was subjected to harsher discipline than the comparable male.

Finally, I wish to voice my concern about two separate aspects of this case. First, I deplore the increasing use of summary judgment when the posture of the case calls for a trial. Pressures allegedly caused by heavy caseloads

ought not be the excuse for violating both the spirit and the literal terms of Fed. R. Civ. P. 56.

Second, it is with regret that I am constrained to say that the disposition of this case seems to reflect a recent trend in the federal courts to blunt the salutary purpose of Title VII of the Civil Rights Acts of 1964. That purpose was clearly stated by Chief Justice Burger in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1970).

> Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Sex and race discrimination with respect to employment opportunities and promotions should be eliminated "root and branch," *cf. Green v. County School Board*, 391 U.S. 430, 438 (1967), and not be left to fester and poison the ideal of equal justice for all segments of our society.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—9-5-85—450

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

VERNADO, CHAFFEE, et al.,
Plaintiffs,

vs.

A & P TEA COMPANY, et al.,
Defendants.

Docket No. 79 C 2735

Chicago, Illinois
February 15, 1984
10:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE CHARLES P. KOCORAS

TRANSCRIPT ORDERED BY: MR. PAUL STRAUSS

APPEARANCES:

For the Plaintiffs:	MR. JUDSON MINER
	MR. PAUL STRAUSS
For the Defendants Chicago Truck Drivers Independent Union:	MR. PAUL GLOVER
For the Defendant A & P:	MR. EDWARD BERGMANN
For the Meatcutters Defendants:	MR. EDWIN BENN

THE CLERK: 79 C 2735, Chaffee vs. A & P and all related cases. Ruling.

MR. GLOVER: Good morning, your Honor, Paul Glover representing the Chicago Truck Drivers Union.

MR. STRAUSS: Paul Strauss on behalf of the plaintiff and Jud Miner.

MR. BENN: Edwin Benn for the Meatercutters defendants.

MR. BERGMANN: Edward Bergmann on behalf of A & P.

THE COURT: Good morning.

We have four separate lawsuits that have been consolidated or purposes of discovery. In each case, the plaintiffs allege that they have suffered some form of employment discrimination on the basis of race or sex.

In the Chaffee case, Verando Chaffee, John Mitchell, William Newbern and Ollie Walker sue A & P, the Meatcutters International Union, Meatcutters Local 546, Meatcutters Local 547 and the Chicago Truck Drivers Independent Union. In the Willie J. West case, Willie J. West, Alvin Miller and Paula Brockhouse sue A & P and Meatcutters Local 320. In the Box case, JoAnn Box sues A & P. In the William R. West case, William R. West sues A & P. Now that discovery has been substantially completed, the plaintiffs want to consolidate these four cases for trial.

In addition, the plaintiffs have moved for certification of this proposed consolidated lawsuit as an across-the-board class action in which they may attack on behalf of every black and every woman who worked for A&P in the Chicago area over a period of nearly ten years, every possible kind of employment decision made by A&P during that time—including "promotions, job assignments, layoffs, discipline, recalls, transfers, hiring and discharges." This same monolithic lawsuit will also serve as a vehicle for challenging a host of practices engaged in by the assorted union defendants.

The plaintiffs propose to prove this sweeping range of charges against this array of defendants by means of statistical evidence that they say will show a widespread pattern of discrimination in every conceivable aspect of the defendants' business affairs.

A reading of the most recent cases on this subject has convinced me that while such vast, across-the-board class

actions may once have been accepted as routine in the employment discrimination field, there has been a significant shift in the law away from such actions. This shift is the result of the strict adherence to Rule 23 that is now required in the wake of the Supreme Court's Falcon decision.

After undertaking the "rigorous analysis" of the Rule 23 prerequisites called for by Falcon, I conclude that the plaintiffs' proposal to try these four actions as a single class action lawsuit with respect to all possible employment practices, must be rejected. The recent cases make it clear that a plaintiff class can only raise claims for which they have a representative who is a member of the class; and, at least under Title VII, for which one of the named plaintiffs filed specific, formal charges with the EEOC.

Thus, for example, a person who complains only of discrimination in promotion cannot serve as a class representative with respect to hiring, layoffs or other employment practices. Similarly, a person who complains only of sex discrimination cannot be a class representative with respect to race discrimination claims. The plaintiffs lack proper representatives for most of the employment practices they seek to challenge. They have taken a handful of people who, between them, have formally and specifically asserted a limited range of grievances and have sought, through these persons, to challenge matters which these persons have not personally complained of.

In addition, somewhat apart from Rule 23's requirements, and bearing more on the question of whether these actions as presently structured should be consolidated for trial in the first instance, there is in my view a danger that the proposed procedure would, at best, be cumbersome and unwieldy; and, at worst, unfair, when the numerous permutations of plaintiffs, defendants and claims are considered.

With a broad based, across-the-board action of the type the plaintiffs wish to pursue, I am concerned that the focus

would not be, as it should be, upon specific charges by specific plaintiffs or groups of plaintiffs against specific defendants.

Accordingly, I will deny the plaintiffs' motion for class certification as it is presently constituted, although it remains possible that some of the myriad of claims in this lawsuit may be appropriate for class treatment with certain of the named plaintiffs acting as class representatives with respect to those claims. Before it is appropriate to even consider that, however, it is necessary to decide which of the named plaintiffs against whom summary judgment motions have been filed will remain in the case.

I, therefore, direct my attention now to the defendants' summary judgment motions. The standard for deciding such motions is familiar and I will not restate it, but I will note that the Seventh Circuit has taken pains in several opinions in the past year to remind us of the long standing rule that a party resisting such a motion has a duty to come forward with specific, concrete facts. What is needed is admissible, factual evidence. Conjecture, speculation, references to matters outside the witness' personal knowledge, conclusory statements and bare assertions of the general truth of a particular matter will not suffice to withstand a properly supported motion for summary judgment.

JoAnn Ford Box is a black female who Complains of race and sex discrimination in promotion because she was not advanced from cashier to bookkeeper when she thought she should be. Defendant A & P moves for summary judgment on Box's discrimination claim, but not on her charge of race discrimination.

I agree with A & P that there is reason to doubt whether Box ever properly presented a specific charge of sex discrimination to the EEOC.

Before this lawsuit, none of the administrative agencies involved seemed to have understood Box's complaint as relat-

ing to sex discrimination. However, I will not grant summary judgment solely on that ground because there is another, more compelling reason to do so: The uncontradicted evidence in the record proves that all vacancies in the bookkeeper position Box sought were filled by other women. In other words, if Box was passed over for promotion, it was done in favor of another female, not in favor of a male. There is, thus, no basis for a sex discrimination charge by Box, and A & P's motion for summary judgment on that claim is granted.

Paula Brockhouse is a white female who was also a cashier for A & P. After making repeated mistakes in keeping track of her cash, she was finally discharged after written warnings had been unavailing in getting her to be more conscientious. Brockhouse does not deny that she made the errors. She simply says that her discharge was the product of sex discrimination. A & P moves for summary judgment.

As an initial matter, I agree with A & P that the only specific charge Brockhouse ever made relates to sex discrimination in discipline and/or discharges. Her nebulous claim of unfairness to women does not qualify her to challenge the whole gamut of employment practices she now seeks to challenge.

As to Brockhouse's claim of discriminatory discharge, she has presented no specific, concrete facts demonstrating that her discharge was motivated by her sex rather than by her five admitted errors, as a cashier, in the handling of her employer's cash. A & P's motion for summary judgment on Brockhouse's claims is, therefore, granted.

John Mitchell, William Newbern and Willie J. West were truckdrivers for A & P. After they had been laid off along with other drivers—something which, by their own admission, was done strictly on the basis of seniority and without regard to race—they stopped paying their union dues. The union eventually expelled them for failure to pay dues.

When all the other drivers were recalled to work, they were not called back since they no longer were in the union; and, therefore, did not qualify for recall under the collective bargaining agreement. Thereafter, Newbern paid his union dues and a new initiation fee; the union immediately readmitted him to membership, and A & P eventually recalled him to work. Because he had been out of the union, however, he lost his seniority and came back as a new employee.

All three men now say that A & P's failure to recall them in 1976 along with the other drivers, who had kept up their union dues, was the result of race discrimination. A & P has moved for summary judgment against all three. Newbern and Mitchell have included their union as a defendant in their discrimination charges; and that union, the Chicago Truckdrivers Independent Union, has also moved for summary judgment with respect to Newbern and Mitchell's claims.

As an initial matter, I once again agree with the defendants that these plaintiffs have not properly asserted challenges to the other employment practices for which they now seek to sue. As revealed by their administrative charges and deposition testimony, these men have been concerned all along only with claims of discrimination in recalls and layoffs.

William Newbern, for example, expressly stated at his deposition that he and other black drivers had not been refused the opportunity to select job assignments on the basis of seniority. Willie J. West made a similar statement. In contrast to these specific disclaimers, in an apparent effort to justify an expansion of these narrow grievances into areas not complained of or contemplated by these men, the plaintiffs offer a selection of vague and conclusory allegations that are completely devoid of any specific factual support.

As for the layoffs and recalls, I have found nothing of substance in the record—and by that, I mean, specific, admissible evidence—which raises a material issue of fact regarding

the claims of these men. The only specific facts demonstrate that they were laid off on the basis of seniority alone, and were not recalled only because unlike the other laid-off drivers, they did not keep current on their dues. There is nothing concrete—indeed, nothing other than conclusory and unsubstantiated allegations—to suggest that these layoffs and failures to recall were induced by racial discrimination.

The summary judgment motions of both A&P and the Truckdrivers Union are granted with respect to the claims of Mitchell, Newbern and Willie J. West.

That is the ruling I have for you this morning. In substance, the case law, Mr. Miner, is that what you seek to do here—and as I listened to your arguments last time—I think it is essentially this: That you allege that A&P in virtually every aspect of its employment practices was controlled by a group of a certain type of people and they made discriminatory decisions along the lines of, principally, race and sex. That kind of an across-the-board case, bringing into question every decision, is, I think, not able to be done because of the case law which requires some specificity; but past that, to do so would result, in my view, in rather than consolidating efforts and enhancing efficiency, would run into the opposite result. We would have a myriad of things applying all over the place, and I think it would be a procedure that is simply not conducive to good comprehension, understanding or efficiency, and it may well lead to substantial unfairness.

So, what I think has to happen at this point is, after you have had some time to digest what I have said here, you might all come back and tell me what your view is about how you intend to proceed, particularly on the plaintiffs' side, and we will do that accordingly. So, I think that is what should be done here.

MR. GLOVER: Your Honor, part of our motion for summary judgment dealt with sex discrimination cases for

persons who were not members of our union. Those charges, on the day of the oral arguments, were dropped concerning the Meatcutters by Mr. Miner, and we had made a similar request both in our motion and brief and also during the oral arguments.

THE COURT: Do you have any opposition to that, Mr. Miner?

MR. MINER: I'm sorry, I did not hear him.

MR. GLOVER: The sex discrimination case—

MR. MINER: Against the union?

MR. GLOVER: Yes. You had dropped them against the Meatcutters and these persons were not members of the Chicago Truckdrivers Union.

MR. MINER: That is correct.

THE COURT: All right. Those charges will be dismissed without opposition. Okay?

MR. MINER: Your Honor, we will have to get a copy of the transcript. Let me make one point. I am sorry about the whole notion of across-the-board. That is a phraseology that began several years ago when this all began, and all of the subsequent briefing has recognized that the issues flow from specific charges of sex discrimination. Now, I think that that was by and large what we had done, but we will obviously want to review your decision. We may ask the Court to reconsider portions of it.

THE COURT: I will give you a chance to do that.

MR. MINER: And then come back with a definition that again ties the allegations—class-wide allegations—to the claims of specific discrimination.

THE COURT: I am going to give you a chance to do that because I think that is contemplated by what I have said here

today. I want you to re-review your position, and I think be more narrow, in my view, and be more selective in what you say certain people can or cannot charge in bringing this as a representative of the class. The question of consolidation for trial, aside from whatever else may survive in this case, is still a problem as I foresee it. I do not know what the best way to handle it, frankly, is; but, at least as I sit here, I am not convinced that the consolidation of a trial of all of these claims is the best way to do it. It may be that we should have some informal discussion about that, but I think yours is the next step, very frankly, as to how you want to proceed at this point in the face of the ruling, and I will give you some time to do that. You tell me how much time you want to evaluate how you want to proceed at this point.

MR. MINER: I would like, if we could have 45 days, to review this. I am going to be taking a vacation and I am up to my ears on other matters that I have to complete by the 4th of March. So, if we could have some time late in March to review this and put together a proposal for the Court?

THE COURT: Okay. I assume that is fair.

MR. GLOVER: That is fine.

THE COURT: All right. Late in March we will set the case for further status and report on how we will proceed.

THE CLERK: March 27th.

THE COURT: Okay.

MR. GLOVER: Thank you, your Honor.

MR. BENN: Thank you, your Honor.

MR. BERGMANN: Thank you, your Honor.

MR. MINER: Thank you, your Honor.

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

_____ _____, 1984

Official Court Reporter

APPENDIX C

C-1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

Name of Presiding Judge, Honorable Charles P. Kocoras

Cause No. 79 C 2735, 79 C 3625
79 C 4332, 79 C 4359

Date 2-15-84

Title of Cause Chaffee -v- A & P

Brief Statement of Motion ruling

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorneys. Pleasc do this immediately below (seperate lists may be appended).

Names and Addresses of moving counsel _____

_____

Representing _____

_____

Names and Addresses of other counsel entitled to notice and names of parties they represent. _____

_____

Reserve space below for notations by minute clerk

For the reasons stated in open court, plaintiff's motion for class certification is denied. Defendant's motion for summary judgment is granted. Status hearing is set for March 27, 1984 at 9:30 am.

Kocoras *J.*

APPENDIX D

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

November 18, 1985.

Before

Hon. WALTER J. CUMMINGS, *Chief Judge*
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. JESSE E. ESCHBACH, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL L. FLAUM, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. LUTHER M. SWYGERT, *Senior Circuit Judge**

JOANN FORD BOX,
Plaintiff-Appellant,

Nos. 84-1732, 84-1733 *vs.*

A&P TEA COMPANY,
Defendant-Appellee.

PAULA BROCKHOUSE,
Plaintiff-Appellant,

vs.

A&P TEA COMPANY, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, LOCAL 320 and INTERNATIONAL BROTHERHOOD OF AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 79 C 4359, 79 C 3625
Charles P. Kocoras,
Judge

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* Judge Swygert did not participate in the vote on the petition for rehearing *in banc*.

· Judge Easterbrook did not participate in consideration of the petition for rehearing *in banc* filed in the above cause.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by counsel for plaintiffs-appellants on September 26, 1985, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing *in banc.*[1] A majority of the judges on the original panel have voted to deny the petition for rehearing.[2] Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing *in banc* be and the same are hereby, DENIED.

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[1] Judge Cudahy voted to grant the petition for rehearing *in banc.*

[2] Judge Swygert voted to grant the petition for rehearing.

APPENDIX E

Rule 56. Summary Judgment

(a) For claimant

A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For defending party

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case not fully adjudicated on motion

If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substan-

tial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When affidavits are unavailable

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits made in bad faith

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

APPENDIX F

§ 2000e-2. **Unlawful employment practices**

EMPLOYER PRACTICES

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

APPENDIX G

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

June 17, 1985

By the Court:

JOANN FORD BOX
& PAULA BROCKHOUSE,
Plaintiffs-Appellants,

Nos. 84-1732 and 84-1733

vs.

A & P TEA COMPANY, et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 79 C 4359
and
No. 79 C 3625
Judge
Charles P. Kocoras

The court, on its own motion, orders that the clerk of the district court shall prepare, certify, and transmit as a supplement to the record on appeal the following items:

1. The deposition of Box filed in the district court on January 20, 1981, in district court case number 79 C 2735.

2. The deposition of Brockhouse filed on January 6, 1981, in district court number 79 C 2735.

3. The plaintiff's filing of deposition exhibits listed in Brockhouse pleading 25 filed on January 4, 1982, in district court number 79 C 3625.

Counsel are advised to tender said documents to the clerk of the district court if these documents are not already in the clerk's possession.

APPENDIX H

** CORRECTED COPY **

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Nos. 84-1732 & 84-1733

JOANN FORD BOX,
Plaintiff-Appellant,

v.

A&P TEA COMPANY,
Defendant-Appellee,

PAULA-BROCKHOUSE,
Plaintiff-Appellant,

v.

A&P TEA COMPANY, ET. AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Illinois

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

JOHNNY J. BUTLER
General Counsel (Acting)

GWENDOLYN YOUNG REAMS
Associate General Counsel (Acting)

VELLA M. FINK
Assistant General Counsel

JEFFREY C. BANNON
Attorney

EQUAL EMPLOYMENT

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IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Nos. 84-1732 & 84-1733

JOANN FORD BOX,
Plaintiff-Appellant,

v.

A&P TEA COMPANY,
Defendant-Appellee.

PAULA BROCKHOUSE,
Plaintiff-Appellant,

v.

A&P TEA COMPANY, ET. AL.,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Illinois

BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

STATEMENT OF INTEREST

The Equal Employment Opportunity Commission is the agency established by Congress to administer, interpret, and enforce Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Private actions filed under Title VII, such as the instant cases, provide the Commission with essential aid in securing the elimination of employment discrimination. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). Because we believe that the decision rendered by the panel majority

severely distorts the legal standards for establishing a Title VII prima facie case and for granting summary judgment in Title VII cases and would seriously hamper both public and private enforcement efforts within this Circuit, the Commission presents its views to the Court.

ARGUMENT

Plaintiffs Joann Box and Paula Brockhouse both worked as cashiers at A&P grocery stores in Illinois, and each alleged that she was a victim of sex discrimination. Box alleged she was denied promotional opportunities and Brockhouse alleged that she was discriminatorily discharged. The district court dismissed both complaints on motions for summary judgment and plaintiffs appealed. A panel of this Court affirmed in a split decision (Swygert, S.J., dissenting). While admitting that these are "close cases" (Slip op. 14 n.6), the majority nonetheless denied plaintiffs the opportunity for trial on the merits of their claims. Since the two cases present differing factual and legal questions, they will be discussed separately.

1. *Box* v. *A&P*:

a. The district court granted summary judgment on two grounds: that Box had not adequately alleged sex discrimination in her charge to the Commission, and that the denial of promotion to bookkeeper could not be sex discrimination since all the company's bookkeepers were women. The panel majority ruled that neither ground supported the judgment. First, the majority found that Box's charge did indeed allege sex discrimination. Slip op. 4. Second, while agreeing that the all-female composition of the bookkeeper job category did bar any promotion claims to that position, the panel found that Box had also alleged denial of promotion to assistant manager. Slip op. 5. In contrast to the bookkeepers, the assistant managers were all men. Thus, the sexual composition of the bookkeeper position could not justify summary judgment.

Although the majority found the only two grounds presented to and relied upon by the district court to be erroneous, the majority nevertheless affirmed the district court on the basis of A&P's argument, presented for the first time on appeal, that Box did not establish a prima facie case because she failed to identify a specific assistant manager vacancy which she would have applied for and was denied. A&P's Brief 10-12. The court ruled that a conclusory allegation in A&P's district court memorandum that Box "cannot show a *prima facie* case" was sufficient notice and gave her a "fair opportunity to submit evidence showing that she could establish a prima facie case" on the assistant manager claim—notwithstanding the fact that neither A&P nor the district court ever mentioned the assistant manager promotions. Slip op. 6.

The majority thus turned to the question whether Box had established a prima facie case and found that she had not because she failed to establish the second element of the *McDonnell Douglas* test, that she had applied for a vacancy for which A&P was seeking applicants. Slip op. 7, *citing McDonnell Douglas* v. *Green*, 411 U.S. 792, 802 (1973). Since A&P never posted its vacancies and thus never sought applicants, the majority agreed that the application requirement was "loosened somewhat". Slip op. 7. Nevertheless, the court ruled that Box was required to identify a specific vacancy for which she would have applied. Slip op. 8.

In fact, Box had presented evidence that she had inquired of her store manager about opportunities for advancement. She stated in her affidavit that she told her store manager she wanted to "advance, for instance, into the assistant manager position. He said that he didn't think that would be possible: it was the Company's policy to usually promote women to the bookkeeper position, he told me." Slip op. 2. The majority characterized these statements as representing only a "vague interest" in the assistant manager position (slip op. 8), and ruled that Box had failed to make out a prima facie case.

b. This ruling is fundamentally wrong for several reasons. First, the evidence of record, viewed in the light most favorable to Box as it must be on a motion for summary judgment, would establish a violation of Title VII even if Box had never expressed any interest in advancement. It is undisputed that A&P neither posts vacancies nor solicits applications for assistant manager positions. Slip op. 7. Employees are selected solely on the Company's subjective assessment of ability and interest. *See* Deposition of John Rogers, App. 192. Such standardless employment systems have been held repeatedly to be suspect under Title VII. *See e.g., Paxton* v. *Union National Bank*, 688 F.2d 552 (8th Cir. 1982); *Rowe* v. *General Motors*, 457 F.2d 348 (5th Cir. 1972).

Subjectivity alone does not constitute a violation, but here there was much more. Analysis of A&P's personnel records showed that during the relevant time period, 27 men but no women were promoted from Box's job category to assistant manager. Moreover, there was direct evidence of discriminatory animus: Box swore in her affidavit that her manager told her the Company refused to promote women to managerial positions. Slip op. 2.

This much alone states a prima facie case. Box did not have to apply because the men who were promoted did not have to apply. The statute after all requires equality of treatment. In order to bring herself to be considered for promotion on the same basis as the male clerks who were promoted, Box had to do precisely what the men had to do—nothing.

As the Eleventh Circuit explained in reversing summary judgment on similar facts:

> To require this plaintiff to demonstrate an explicit expression of interest in specific jobs would . . . be at odds with the purposes of the prima facie case in analyzing evidence. . . .

> The paradigmatic prima facie case, described in *McDonnell Douglas*, requires the plaintiff to prove he "applied for" a job to eliminate [an] obvious nondiscriminatory reason: that the plaintiff was not offered the job because the company did not know he was interested. . . . By showing that he applied, the plaintiff shows that the employer knew he was interested in the job. . . . Furthermore, when an employer uses such informal methods [as no posting or application process] it has a duty to consider all those who might reasonably be interested, as well as those who have learned of the job opening and expressed an interest.

Carmichael v. *Birmingham Saw Works*, 738 F.2d 1126 (11th Cir. 1984). Simply stated, when vacancies are not posted, an application is not required to state a prima facie case. *Gifford* v. *Santa Fe Railway*, 685 F.2d 1149, 1154 (9th Cir. 1982); *Grove* v. *Frostburg National Bank*, 549 F.Supp. 922 (D.Md. 1982); *Caston* v. *Duke University*, 34 FEP Cases 102 (M.D. N.C. 1983); *Ombu* v. *Children's Television Workshop*, 516 F.Supp. 1055 (S.D.N.Y. 1981).

c. Box had an additional reason to believe she should have been considered for promotion: she asked to be promoted. She testified at her deposition that she asked her manager every year about opportunities for advancement. App. 54. Both in her deposition and her affidavit, Box identified the assistant manager position as a position for which she wanted to be considered. Slip op. 8. Even if the majority is correct to characterize these statements as expressing only a "vague interest" in the assistant manager position (*Id.*), they are more than sufficient to meet any application requirement in the absence of any formal application procedure. *See Holsey* v. *Armour & Co.*, 743 F.2d 199, 208 (4th Cir. 1984) ("casual inquiry" sufficient); *Ferguson* v. *duPont*, 560 F.Supp. 1172, 1193 (D.C. Del. 1983) ("generalized expression of interest").

The majority's holding that Box was required to identify specific vacancies she would have applied for—if she had known of them—makes no sense. Why, as Judge Swygert asks in his dissent, does denial of one promotion state a claim but denial of 27 not? Slip Op. 15. A&P presented no evidence to show that Box was not eligible for these jobs on the same basis as the 27 successful male clerks. There is simply no basis in fact, law, or reason to require Box to limit her claim. At best, greater factual development of the circumstances of the individual promotions is a matter for trial.

d. The "would have applied" requirement is a misapplication of the *Teamsters* solution to the problem of the deterred applicant. *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324, 367 (1977). There, such testimony was required to excuse a failure to apply when the employment system required applications, but the discrimination was so blatant that the blacks knew it was futile to apply. The deterred applicants were presumably aware of the openings contemporaneously and could testify to their state of mind at that time. Here, Box only learned the particulars during discovery. It is unclear what her hypothetical assertions as to what she would have done if A&P posted vacancies and received applications would add to any proper legal analysis.

If the "would have applied" standard had been made known in advance, it would be essentially trivial—Box could easily aver that she would have applied for every vacancy. However, not only was the argument concerning Box's ability to make a prima facie case with respect to the assistant manager positions first raised on appeal, but the argument raised by A&P was substantially different from that adopted by the panel majority.[1] A&P argued that Box should have identified specific vacancies because it claimed that "the only evidence in the

[1] The panel's misreading of A&P's argument illustrates why most appellate courts require initial resolution of disputes in the district courts.

record is that there were no vacancies in the assistant manager position during the period covered by Box's charges." A&P Br. 12. If A&P's factual predicate had been correct, it would have been entitled to judgment; but, as even the panel majority recognized, there were in fact 27 such vacancies.[2] Since there were vacancies denied to Box, A&P's argument fails and the panel majority's assertion of the "would have applied" standard *sua sponte* is both wrong as a matter of law and manifestly unfair to Joann Box.

e. Finally, it should be noted that the majority's decision to reach the question of the propriety of summary judgment on the promotion to management claim is contrary to the clear law of this circuit. Even if the panel were correct in its analysis of the prima facie case, it was error to put the burden on Ms. Box to prove a prima facie case since A&P never established the absence of a genuine issue of material fact. *Yorger* v. *Pittsburgh Corning Corp.*, 733 F.2d 1215, 1222 (7th Cir. 1984); *Egger* v. *Phillips*, 710 F.2d 292, 296 (77th Cir.)(*en banc*), *cert. denied*, 104 S.Ct. 284 (1983). *Accord, McKinney* v. *Dole*, ____F.2d ____, 38 FEP Cases 364, 368 (D.C. Cir. 1985).

A&P can hardly be said to have met its burden since it never even mentioned the issue of promotion to management before the district court. The panel majority cites only conclusory allegations from A&P's district court memoranda to the effect that Box's deposition testimony does not establish a prima facie case. Slip op. 6. Yet, mere allegations are not sufficient to shift the burden of proof. Absent a demonstration that there were no material issues of fact, Box was under no obligation to produce any evidentiary support for her claims.

---

[2] A&P's sole support for its position that there were no vacancies is the statement in the Illinois Fair Employment Practices Commission report that "no one [was] promoted to assistant manager in the Kankakee location" in 1975 and 1976. Appendix 46. However, A&P admitted that the area of consideration for supervisory positions was the Chicago division and not an individual store. App. 117-8; 212-4. There were 27 clerks in the Chicago division promoted to assistant manager between 1975 and 1978. App. 153.

Under the panel's reasoning, a plaintiff faced with a motion for summary judgment must submit evidence supporting every element of its claim whether challenged or not. This ruling turns the law on its head and should not stand.

2. *Brockhouse* v. *A&P, et al.:*

A&P discharged Paula Brockhouse from her position as cashier for "a $9.50 overage in her cash drawer" following several previous warnings. Slip op. 9. In support of her claim that this action was discriminatory, Brockhouse argued that men were not subject to discipline when they were found with cash discrepancies. The majority discounted most of Brockhouse's evidence on this point because her affidavit failed to comply with Rule 56(e), Fed.R.Civ.P., requiring that it state affirmatively that it was made upon personal knowledge. *Id.* The court construed Brockhouse's affidavit and deposition testimony as possibly containing the following admissable evidence: that Lance Gardner, a new male employee who cashiered occasionally, had not been disciplined for a cash shortage. Slip op. 12. The majority held that this did not create a material issue of fact because the "only reasonable inference" is that Brockhouse and Gardner were not "similarly situated." *Id.*

This holding is erroneous for two reasons. First, the evidence considered by the panel majority clearly does raise a material issue of fact: given the three acknowledged differences between Brockhouse and Gardner - seniority, job duties, and sex—it is a question of motive and intent as to which difference motivated the difference in employer response to the cash discrepencies. *See, Baldini* v. *Local 1095, UAW*, 581 F.2d 145, 151 (7th Cir. 1978) (question of motive and intent not appropriate for summary judgment); *Cedillo* v. *Iron Workers*, 603 F.2d 7, 11 (7th Cir. 1979) (same). The majority's assumption that legitimate considerations of seniority and job

duties must have motivated the company is definitely not the "only reasonable inference": in most employment circumstances, the employee with greater seniority is treated more, rather than less, leniently; and as Judge Swygert noted in his dissent (slip op. 17), the difference in job duties can itself be taken as evidence of sex discrimination since A&P consistently segregated its jobs by sex. At the very least, Brockhouse is entitled to a trial on the issue.

Second, the majority also erred by discounting the balance of Brockhouse's evidence. A&P never challenged this evidence, and while Rule 56(e) certainly states that affidavits require personal knowledge, it is well-settled that:

> '... if a party submits an inadmissible affidavit and the opposing party does not move to have it striken, any objections to its consideration are deemed to be waived and it may properly be considered by the court when ruling on the motion.

Davis v. *Sears, Roebuck & Co.*, 708 F.2d 862 (1st Cir. 1983); *Klingman* v. *National Indemnity Co.*, 317 F.2d 850 (7th Cir. 1963); *Lacey* v. *Lumber Mutual Fire Insurance Co. of Boston*, 554 F.2d 1204 (1st Cir. 1977); see, Wright, Federal Practice and Procedure, sec. 2738 at 507-509 (1983); 6 Moore's Federal Practice Para. 56.22[1] at 56-1330 (1982).

While it is within the district court's discretion to reject affidavits which fail to conform to the rule, *City Federal Savings* v. *Federal Home Loan Bank*, 600 F.2d 681, 688 (7th Cir. 1978), the exercise of that option should be explicit. The affidavit in question was not a conclusory allegation of discrimination, but stated specific concrete facts raising a clear issue for trial, *viz.*, that the store manager said men would not be disciplined for similar offenses and that men had committed such offenses without discipline. Slip Op. 11. It is a matter of conjecture whether the district court granted summary judg-

ment because these facts were held to be insufficient as a matter of law or were discounted because of Rule 56(e). If it was only the form that was found deficient, it could have been easily cured to reflect plaintiff's personal knowledge had she been given notice. Under the panel's ruling, a minor drafting error by counsel serves to deprive Brockhouse of her trial on the merits.

CONCLUSION

For the reasons stated above, the Equal Employment Opportunity Commission supports plaintiffs' petition and respectfully requests this Court rehear these appeals, and if necessary, rehear them in banc.

Respectfully submitted,

JOHNNY J. BUTLER
General Counsel (Acting)

GWENDOLYN YOUNG REAMS
Associate General Counsel (Acting)

VELLA M. FINK
Assistant General Counsel

JEFFREY C. BANNON
Jeffrey C. Bannon
Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
2401 E Street, N.W., Rm. 224
Washington, D.C. 20507
(202/FTS) 634-6150

October 10, 1985

APPENDIX I

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

VARNADO CHAFFEE, et al.,
Plaintiffs,

v.

A & P TEA COMPANY, et al.,
Defendants.

No. 79 C 2735

WILLIE J. WEST, et al.,
Plaintiffs,

v.

A & P TEA COMPANY, et al.,
Defendants.

No. 79 C 3625

WILLIAM R. WEST,
Plaintiff,

v.

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Defendant.

No. 79 C 4332

JoANN FORD BOX, et al.,
Plaintiffs,

v.

A & P TEA COMPANY,
Defendant.

No. 79 C 4359
Judge Joel Flaum

DEFENDANT A&P'S MOTION FOR SUMMARY JUDGMENT ON THE SEX DISCRIMINATION CLAIMS OF JoANN FORD BOX AND PAULA BROCKHOUSE

NOW COMES defendant GREAT ATLANTIC & PACIFIC TEA COMPANY, INC. by its attorneys and moves this court that defendant be granted summary judgment under Rule 56 of the Federal Rules of Civil Procedure on the claim of sex discrimination filed by plaintiff JoAnn Ford Box and the claim of Paula Brockhouse in its entirety. In support of this motion, defendants states the following:

(1) There is no genuine issue as to any of the material facts upon which this motion is based.

(2) Plaintiff Box alleged both race and sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The undisputed facts establish, however, that plaintiff Box did not make a claim of sex discrimination in the Equal Employment Opportunity Commission charge which purports to support this action. Moreover, a claim of sex discrimination did not grow out of the investigation of Box's charge by the Illinois Fair Employment Practice Commission and the EEOC. Accordingly, this court lacks jurisdiction to entertain any sex discrimination claim by plaintiff Box.

(3) Plaintiff Brockhouse's claim is limited to a charge of sex discrimination. The undisputed facts, as established by plaintiff Brockhouse's deposition, show that she cannot establish a *prima facie* case of discriminatory discharge. Moreover, there is no evidence that the stated reasons for the termination was a pretext for discrimination. In addition, although plaintiff Brockhouse alleged discriminatory job assignment, promotion and transfer in her complaint, those claims must be dismissed because they were not the subject matter of an EEOC charge. Accordingly, summary judgment should be granted in defendant's favor on plaintiff Brockhouse's claim in its entirety.

In further support of this motion, defendant submits the accompanying memorandum.

Respectfully submitted,

GREAT ATLANTIC & PACIFIC
TEA COMPANY, INC.

By /s/ EDWARD W. BERGMANN
Edward W. Bergmann
One of Defendant's Attorneys

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

February 24, 1982

APPENDIX J

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

VARNADO CHAFFEE, et al., *Plaintiffs,* v. A & P TEA COMPANY, et al., *Defendants.*	No. 79 C 2735
WILLIE J. WEST, et al., *Plaintiffs,* v. A & P TEA COMPANY, et al., *Defendants.*	No. 79 C 3625
WILLIAM R. WEST, *Plaintiff,* v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., *Defendant.*	No. 79 C 4332
JoANN FORD BOX, et al., *Plaintiffs,* v. A & P TEA COMPANY, *Defendant.*	No. 79 C 4359 Judge Joel Flaum

DEFENDANT A&P'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON THE SEX DISCRIMINATION CLAIMS OF JoANN FORD BOX AND PAULA BROCKHOUSE

A. Introduction

JoAnn Ford Box and Paula Brockhouse are the only two women among the nine plaintiffs in the above four cases. JoAnn Ford Box, a black female, is the sole plaintiff in 79 C 4359. Her claim is based upon both race and sex. She was a cashier and a member of the Retail Clerks Union, but she did not join her union as a defendant. Paula Brockhouse, a caucasian female, is one of three plaintiffs in 79 C 3625 and she alleges sex discrimination. She was a cashier and a member of the Retail Clerks Union, but did not join her union as a defendant.[1]

Plaintiff Box's complaint is in three counts. Count I—race discrimination under Title VII of the Civil Rights Act of 1964, Count II—race discrimination under 42 U.S.C. § 1981, and Count III—sex discrimination under Title VII. Plaintiff Brockhouse's claim is stated in Count III of 79 C 3625 and is limited to a sex discrimination claim under Title VII. Defendant A&P seeks summary judgment only with respect to the sex discrimination claims of plaintiffs Box and Brockhouse.

B. The Applicable Law

The Seventh Circuit has made it clear in recent cases that when, as evidenced by a plaintiff's deposition, there is no evidence to support an employment discrimination claim, summary judgment should be granted. *Patterson v. General Motors Corporation,* 631 F.2d 476, 482 (7th Cir. 1980); *Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1218 (7th Cir. 1980). In this regard, "mere conclusory assertions of discrimination are not sufficient to withstand a motion for summary judgment." *Patterson, supra* at 482. Thus, when the undisputed facts which emerge from a plaintiff's deposition show that she cannot show a *prima facie* case or that there is no

[1] The other two plaintiffs in 79 C 3625 are Alvin Miller, a journeyman meatcutter, and Willie J. West, a truck driver.

evidence that the defendant's stated reason for the challenged action is a pretext for discrimination, summary judgment is appropriate. *Kephart, supra* at 1219, 1220, 1224; *Kapuska v. United Airlines*, 25 FEP Cases 1283, 1285 (N.D. Ill., J. Shadur, 1981) (summary judgment granted where plaintiff failed to provide any evidence to support claim of discriminatory motive during discovery); *Otis v. Inland Container*, 25 FEP Cases 1280, 1282-1283 (N.D. Ill., J. Aspen, 1981) (summary judgment granted because no *prima facie* case or evidence of pretext when plaintiff had no evidence of whites who had been treated differently); *Schroer v. Swift & Co.*, 27 FEP Cases 1322, 1323 (N.D. Ill., J. McMillen, 1981) (undisputed facts which emerge from depositions overcome plaintiff's contentions).

C. Plaintiff Box's Claim For Sex Discrimination Must Be Dismissed Because Of Her Failure To Raise A Claim Of Sex Discrimination In Her EEOC Charge

The complaint in each case contains the standard employment discrimination, class action, boilerplate allegations. Thus, one must look to their underlying EEOC charges and the plaintiffs' depositions to discover the true nature of their complaints.

Plaintiff Box filed her original EEOC charge on January 13, 1975, alleging that she had been denied a bookkeeper's job "solely because of my race" (Exhibit A, page 2). This charge was then perfected by an amended charge dated July 21, 1976 and deferred to the state of Illinois (Exhibit B-2). The typewritten text of the amended charge alleges that she was denied a "promotion to the position of bookkeeper [as] a result of racial discrimination. In the upper right-hand corner, in the space for checking the "Cause of Discrimination," the box for "Race or Color" is marked with two typewritten "x's." Although on the charge as it now appears there is a handwritten "x" in the "sex" box, as discussed hereafter, it is apparent that mark was made after the investigation and there is no in-

dication that the charging party sought to charge sex discrimination. Thus, for example, the amended EEOC charge (TCH6-2895) was deferred to the state of Illinois for investigation and the state form notifying A&P of the deferral lists as the only type of discrimination "Race/Black" (Exhibit B-1).

Thereafter, the charge was investigated and an Investigation Report issued by the state (Exhibit C). Throughout the report, the charge is referred to as a race charge. Indeed, as evidence that sex was not an issue, the discussion of the facts shows that Plaintiff Box could not have intended to assert a sex charge because all of the persons promoted to the bookkeeper position she sought were women (Exhibit C, page 2). Based on the findings of the Illinois Commission, the EEOC then issued its decision that there was not reasonable cause to believe that Respondent violated Title VII (Exhibit D).

In short, plaintiff Box never intended to bring a sex discrimination charge[2] and the two agencies never treated it as a sex discrimination charge.

In *Jenkins v. Blue Cross Mut. Hospital Ins., Inc.*, 538 F.2d 164 (7th Cir. 1976), the Seventh Circuit defined the limits of a district court's jurisdiction under Title VII. The Court held that "the complaint in the civil action . . . may properly encompass any . . . discrimination like or reasonably related to the allegations of the charge and growing out of such allegations." 538 F.2d at 167. In that case, the court disregarded the plaintiff's failure to check the box on the charge for "sex" and looked to the substance of the actual allegations to determine that the statements in the charge alleged both race and sex discrimination. Similarly, the facts recited in the charge in this case must control over the penned-in "x" in the "sex" box on

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[2] Indeed, even at her deposition, Box testified that she had filed her EEOC charge on her own behalf and on behalf of all other blacks (Box Dep. at 66).

one of the charges which was obviously entered for some unexplained reason after the charge was filed. The statements in the charge allege only race discrimination, the evidence offered in the investigation related only to race discrimination and both the EEOC and the Illinois Commission treated the charge solely as a race charge.

Plaintiff Box cannot allege that a claim of sex discrimination is "like or reasonably related" to her claim of race discrimination and a claim of sex discrimination did not grow out of the investigation of that charge. Her claim of sex discrimination must be dismissed. *McCray v. Standard Oil Co. (Ind.)*, 18 FEP Cases 758, 762 (N.D. Ill., J. Marshall, 1977); *Black Grievance Comm. v. Phil. Electric Co.*, 18 FEP Cases 1013, 1025 (E.D. Pa. 1978); *Saad v. Burns Intern. Sec. Services, Inc.*, 456 F. Supp. 33, 36 (D.C. D.C. 1978).

Indeed, that plaintiff's administrative charge concerning her promotion was dismissed for lack of substantial evidence makes her attempted expansion of that charge in her judicial complaint particularly egregious. As one federal district court stated:

> [T]he problem is exacerbated where, as here, the EEOC investigates and finds no reasonable cause to support the original discrimination charges and the plaintiff thereafter attempts to expand her judicial complaint to encompass new areas of alleged discrimination which denies the defendant employer any possibility of settlement through conciliation. Unrestrained expansion of the scope of Title VII suits . . . will result in valid claims being lost in the ever-increasing number of Title VII suits.

Hubbard v. Rubbermaid, Inc., 436 F. Supp. 1184, 1190 (D. Md. 1977). Therefore, plaintiff cannot be permitted to litigate the sex discrimination claims contained in her complaint which were neither raised nor investigated by the EEOC or FEPC.

D. Plaintiff Brockhouse's Discriminatory Discipline And Discharge Claims Have No Evidentiary Support

As noted, Paula Brockhouse is a white female who alleges only sex discrimination.

Paula Brockhouse applied and was hired for a cashier position at A&P in November, 1970 (Brockhouse Dep. at 3, 10). She worked as a cashier from November, 1970 until about November, 1972 at an A&P store located in Jacksonville, Illinois. She quit her job at that time because of pregnancy complications and reapplied for a cashier position at the same store in August, 1974. She was rehired at that time and continued her employment until August, 1978, when she was discharged for repeated shortages and overages in her cash collections (Brockhouse Dep. at 10-12, 19, 21).

Brockhouse filed her EEOC charge in September, 1978, alleging that her termination was discriminatory[3] (Exhibit E). That charge was deferred to the Illinois Fair Employment Practices Commission which investigated the charge and determined that it had no merit (Exhibit F). Thereafter, the EEOC issued its Notice of Right To Sue finding that there was no reasonable cause to believe a violation occurred (Exhibit G).

At her deposition, Brockhouse was unable to come up with anything to support her claim. As Brockhouse acknowledged, she was discharged on August 28, 1978 because of a $9.50 overage in her cash drawer (Brockhouse Dep. at 19, 21). Not only did she admit the overage (*id.* at 19), but she described a series of four similar incidents (none of which she denied) for which she had previously received written warnings in December, 1977 and March, April and August, 1978 (*id.* at 16-18). Moreover, she did not know of a single other employee (male or female) who had been discharged during her eight years of employment (*id.* at 21, 22).

---

[3] She also charged "harassment" but her complaint herein does not allege harassment so that aspect of the charge is not relevant.

Thus, she admittedly was not performing her job satisfactorily which means that she cannot satisfy one of the elements of a *prima facie* discharge case under Title VII. *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1283 (7th Cir. 1977); *Otis v. Inland Container Corp.*, 25 FEP Cases 1280, 1282 (N.D. Ill. 1981). Moreover, there is simply no substantial evidence that the acknowledged reason for the termination was a pretext for discrimination, particularly in light of plaintiff's inability to identify any other incidents of different treatment. *Otis* at 1283.

Finally, although plaintiff Brockhouse also alleged discriminatory job assignment, promotion and transfer in her complaint, under the *Jenkins v. Blue Cross Mut. Hosp. Ins. Inc.*, 538 F.2d 164 (7th Cir. 1976), standard, those claims must be dismissed because they were not the subject of an EEOC charge. *E.g., Abraham v. Field Enterprises,* 511 F. Supp. 91, 93 (N.D. Ill. 1980) (when EEOC charge limited to alleged discriminatory discharge, plaintiff may not bring Title VII case alleging discrimination in promotions, training and evaluation); *Harris v. Caterpillar Tractor Co.*, 18 FEP Cases 765, 766 (S.D. Ill. 1978) (EEOC charge limited to discharge allegation cannot support challenge to employer's policies relating to compensation, terms, conditions and privileges of employment, promotions, hiring, job assignments, job classifications and overtime); *Conrad v. AMP, Inc.*, 20 FEP Cases 905, 906 (M.D. N.C.) (claims of race and sex discrimination in promotion and work assignments dismissed because not reasonably related to EEOC charge of unlawful discharge); *see also, Selman v. Kendall/Hunt Publishing Co.*, 20 FEP Cases 1712, 1713 (N.D. Ga. 1979); *Tucker v. Harley Davidson Motor Co.*, 454 F. Supp. 738, 742 (E.D. Wis. 1978). This is particularly true in this case where it is undisputed that, in fact, the administrative agencies treated the charge solely as a termination charge in the investigation (Exhibit F).

CONCLUSION

Based on the foregoing, summary judgment should be granted for defendant on plaintiff Box's claim of sex discrimination and on plaintiff Brockhouse's claim in its entirety.

Respectfully submitted,

THE GREAT ATLANTIC &
PACIFIC TEA COMPANY

By /s/ EDWARD W. BERGMANN
Edward W. Bergmann
One of Defendant's Attorneys

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

February 24, 1982

TECHNICAL — CONFIDENTIAL

Morton Thiokol v. Argus
G.A. NO. 84-5685

CHARGE OF DISCRIMINATION

FORM APPROVED OMB NO. 124-R0001

INSTRUCTIONS

If you have a complaint, fill in this form and file it with the Equal Employment Opportunity Commission's District Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE. *(Attach extra sheets of paper if necessary.)*

CAUSE OF DISCRIMINATION

- [X] RACE OR COLOR
- [ ] SEX
- [ ] RELIGIOUS CREED
- [ ] NATIONAL ORIGIN

NAME *(Indicate Mr. or Mrs.)*: MRS. JO ANN FORD

DATE OF BIRTH: 2/16/39

STREET ADDRESS: 282 N. CHICAGO AVE

COUNTY: KANKAKEE

SOCIAL SECURITY NO.: 428-66-5769

CITY, STATE, AND ZIP CODE: KANKAKEE ILLINOIS 60901

TELEPHONE NO. *(Include area code)*: 935-3237 — (815)

THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME

NAME *(Indicate Mr. or Mrs.)*:

TELEPHONE NO. *(Include area code)*:

STREET ADDRESS:

CITY, STATE, AND ZIP CODE:

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU *(If more than one, list all)*

NAME: Hospital

TELEPHONE NO. *(Include area code)*: 939-9573 (815)

STREET ADDRESS: 2215 E. Court St.

CITY, STATE, AND ZIP CODE: KANKAKEE, ILL. 60901

OTHERS WHO DISCRIMINATED AGAINST YOU *(If any)*: Manager & Supervisor & Bookkeeper
We have had many

CHARGE FILED WITH STATE/LOCAL GOV'T. AGENCY: [ ] YES [ ] NO

DATE FILED:

AGENCY CHARGE FILED WITH *(Name and address)*:

APPROXIMATE NO. OF EMPLOYEES/MEMBERS OF COMPANY OR UNION THIS CHARGE IS FILED AGAINST: Company & it Manager & Supervisor

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE *(Month, day, and year)*: 1974

Explain what unfair thing was done to you and how other persons were treated differently. Understanding that this statement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

Statement att.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

DATE: 1/13/75

CHARGING PARTY *(Signature)*: Mrs. Jo Ann Ford

Subscribed and sworn to before this EEOC representative.

DATE:

SIGNATURE AND TITLE:

NOTARY PUBLIC

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE *(Day, month, and year)*:

SIGNATURE *(If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the District Office. The Commission will notarize the charge for you at a later date.)*

EEOC FORM JUN 72 5 Previous editions of this form may be used.

U.S. GOVERNMENT PRINTING OFFICE : 1973—728-451 1250 GPO 871-498

EXHIBIT A

J-9

BEST AVAILABLE COPY

Kankakee, Ill. 60901
282 N. Chicago Ave.
Jan. 13, 1975

Chicago District Office
Equal Employment Opportunity Commission
536 South Clark St. Room 234
Chicago, Ill. 60605

Dear Sir,

My name is Jo Ann Ford, I am a Black female employee of A&P Food Co. I have been employed since July 22, 1965 as a Cashier Clerk, which title I still hold. When I come to work for this Company, I had been trained by National Cash Register Co. I had 1 year experience from O'Donnell's Super market, and I also had training in Bookkeeping. I have made several attempts since I been employed by A&P to get upgraded but I have never been granted the opportunity. When ever there were opening I had no way of knowing of them till they were being fill. There have been four moved to Bookkeeping Classification, all Four had less seniority then I do. To my knowledge only one had had Training.

I have discuss this matter several time with several manager and Supervisor that we have had since I have been with A&P without any result.

My attends and work performance has not been questionable. I have been denied the opportunity for further Training and upgrading salary because of my Race, therefore I am asking for any help your office can give.

Thank You
Mrs. Jo Ann Ford
282 N. Chicago Ave.
Kankakee, Ill. 60901
933-3237-(815)
at work 939-9573

Subscribed and Sworn to before me this
10th day of February, 1975

_____ Notary Public

/s/ Jo Ann Ford

STATE OF ILLINOIS
FAIR EMPLOYMENT PRACTICES COMMISSION

Chicago Office:
179 W. Washington
Chicago, Il 60602—
312/793-2240

Springfield Office:
4500 S. 6th Street Road
Springfield, Il 62703—
217/786-6870

FOR OFFICE USE ONLY

Dated Filed: 10-27-76
No. 77CF-258 (TCH6-2895)

CHARGE OF UNFAIR EMPLOYMENT PRACTICE

I, JoAnn Ford Address 282 N. Chicago
City Kankakee State Illinois (Zip Code) 60901
Phone 815-933-3237
charge on my own behalf to have been personally aggrieved by an unfair employment practice committed by (Respondent) A&P Foods, The Great Atlantic & Pacific Tea, Address 2215 E. Court St. (City & State) Kankakee, Illinois (Zip Code) 60901 Telephone 815-939-9573 on the 28th day of Febuary 1976 at Kankakee, Illinois because of my Race/Black (Type of Discrimination).

The facts of the alleged unfair employment practices are:
See copy of attached EEOC charge

_____-_____, on oath or affirmation states that __he is the complainant herein, that __he has read the foregoing charge and knows the contents thereof, and that the same are true and correct to the best of his/her knowledge.

_____
Signature of Complainant

SUBSCRIBED and sworn to before me this ____ day of ____ 19 ____ at _____, Illinois

_____
Notary Public
My commission expires on _____.

BEST A

AVAILABLE COPY

TECHNICAL—CONFIDENTIAL

Morton Thiokol v. Argus
C.A. NO, 84-5685

FEPC
CHICAGO—8
RECEIVED
AUG 13 1976
BY

(PLEASE PRINT OR TYPE)

CHARGE OF DISCRIMINATION	EEOC CHARGE NO. TNC-2795	FORM APPROVED OMB NO. 124-R0001

INSTRUCTIONS
If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's District Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE. *(Attach extra sheets of paper if necessary.)*

CAUSE OF DISCRIMINATION
☒ RACE OR COLOR ☒ SEX
☐ RELIGIOUS CREED
☐ NATIONAL ORIGIN

NAME (Indicate Mr. or Mrs.)	DATE OF BIRTH
Mrs. JoAnn Ford	2/16/39
STREET ADDRESS: 282 N. Chicago	COUNTY: Kankakee
SOCIAL SECURITY NO.: 428-66-5769	
CITY, STATE, AND ZIP CODE: Kankakee, Il. 60901	TELEPHONE NO. (Include area code): 815-933-3237

THE FOLLOWING PERSON ALWAYS KNOWS WHERE TO CONTACT ME

NAME (Indicate Mr. or Mrs.)	TELEPHONE NO. (Include area code)
STREET ADDRESS	CITY, STATE, AND ZIP CODE

LIST THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT WHO DISCRIMINATED AGAINST YOU *(If more than one, list all)*

NAME	TELEPHONE NO. (Include area code)
A&P Foods, The Great Atlantic & Pacific Tea CO.	815-939-9573
STREET ADDRESS: 2215 E. Court St.	CITY, STATE, AND ZIP CODE: Kankakee, Il. 60901

OTHERS WHO DISCRIMINATED AGAINST YOU (If any)	Manager, Assistant Manager, Supervisor and Bookkeeper

CHARGE FILED WITH STATE/LOCAL GOV'T.	DATE FILED	AGENCY CHARGE FILED WITH (Name and address)
	7-21-76	Peoria [illegible], Ill.

...atement is for the use of the United States Equal Employment Opportunity Commission, I hereby certify:

I am a black woman. I have worked for A&P as a cashier for 9 years During that time, I have asked several times to trained as a bookkeepe The most recent time was 2/28/76. . The store has hired and trained other persons (exactly 4) with much seniority than myself. I have had classroom training as a bookkeeper (36 hours). Only one (1) of the four persons mentioned above has had any training as a bookeepor. I feel that the continued denial of my promotion to the position of bookkeeper is a result of racial discrimination. When these bookkeeper positions were vacant, I have had no knowledge of the vacancies until they were filled. I appreciate any help you can give me in this situation.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

DATE: 7/20/76

CHARGING PARTY (Signature)

Subscribed and sworn to before this EEOC representative:

DATE

SIGNATURE AND TITLE

NOTARY PUBLIC

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, month, and year)

July 21 1976

SIGNATURE (If it is difficult for you to get a Notary Public to sign this, sign your name and mail to the District Office. The Commission will notarize the charge for you at a later date.)

Marvin Bass

EEOC FORM Jun 72 5 Previous editions of this form may be used.

U.S. GOVERNMENT PRINTING OFFICE : 1973—728-481/1280 3-...
GPO 871-...

J-13

EXHIBIT B-2

BEST AVAILAB...

STATE OF ILLINOIS
FAIR EMPLOYMENT PRACTICES COMMISSION
INVESTIGATION REPORT

(A) (B)
FEPC NO. 1977CFO258, 1977CNO261 EEOC NO. TCH6-2895

COMPLAINANT	RESPONDENT
Joann Ford Box Kankakee	The Great Atlantic & Pacific Tea Company, Kankakee

I. *Recommendation*
Lack of Substantial Evidence

II. *Action/Basis/Section*
Failure to promote because 3(A)

III. *Jasper Turner Sr./rmv Sharon Shaw 8-21-79*

IV. *Dates*

	(A)	*(A)*
Alleged Violation	2/28/76	2/28/76
Charge Filed	8/13/76	8/12/76
Fact Finding Conference	None	
Report	8/10/79	

V. *Respondent's Type of Operation*
Retail Grocery

VI. *Union Involvement*
RCIA Local 1504. Complainant didn't file a grievance, no union involvement.

VII. *Employment Data*
Respondent's EEO-1 report for 1976 indicates: Total Employees:

Total	Blacks
4389	723(16%)

LE COPY

EXHIBIT C

JoAnn Ford Box
Charge Nos: 1977CFO258, 1977CNO261

VIII. *Allegations*

Complainant alleges that Respondent has continually denied her a promotion because of her race, Black. Complainant alleges that a Caucasian co-worker, with less experience, training and seniority than herself was promoted, while she wasn't

IX. *Response to Allegations*

Respondent states Complainant's allegation is totally false. There was only one promotion during 1976 in the Complainant's location. The individual promoted had more experience, training, and seniority than Complainant.

X. *Uncontested Points*

A. Complainant was hired as a part-time clerk on 7/22/65 at Respondent's Kankakee location.

B. Complainant was terminated (voluntary) on 11/7/66.

C. Complainant was rehired on 2/5/67 as a part-time clerk at Respondent's Kankakee location.

D. Complainant became a full-time cashier on 5/5/68 at the Kankakee location.

XI. *Issue*

Promotion

A. *First Contested Point*

Whether Complainant has denied promotions?

1. *Documentation*

Exhibit A—Respondent's list of promotions to Bookkeeper (Head Cashier) for 1975 and 1976. List shows four promotions for 1975, all female, Caucasians, none in Kankakee location. The list

shows two promotions in 1976, both individuals promoted were female Caucasians. There was one promotion in Kankakee in 1976, Genevieve Boyd.

Exhibit B—Genevieve Boyd's, Caucasian, classification and rate change forms from Respondent. The form indicates that Ms. Boyd was hired on 10/8/55 as a part-time cashier and became a full-time cashier on 6/4/56. Promoted to Head Cashier (Bookkeeper) on 5/23/70. Demoted on 8/7/71 to full-time cashier because the store she worked in closed. Ms. Boyd was promoted to temporary Head Cashier (Bookkeeper) on 3/6/76.

Exhibit C—Respondent's list of employees promoted to assistant managers in 1975 and 1976. The list shows there was no one promoted to assistant manager in the Kankakee location.

Exhibit D—Joan Horstmann's, Caucasian, employment records with Respondent. The records indicate Ms. Horstmann was hired as a part-time clerk and back-up Bookkeeper on 5/3/66.

2. *Witnesses*

Complainant states she had asked Respondent several time to be trained as a Bookkeeper in their Kankakee store. Respondent had hired and trained four Caucasians with less seniority to become Bookkeepers. Complainant states she can only name three of the four individuals: D. Martin, Joan Horstmann, and Lucille Horton. Complainant states only one of the three persons mentioned has had classroom training for bookkeeping. Complainant states she has had training as a Bookkeeper, 36 classroom hours.

JoAnn Ford Box
Charge Nos: 1977CFO258, 1977CNO261

Complainant states she has no knowledge of vacancies for Bookkeeper position until the positions are filled. Complainant also states she has been denied a promotion to Assistant Manager.

Complainant states she feels that the continued denial of a promotion to the position of Bookkeeper is a result of racial discrimination.

Edward W. Berrmann, Caucasian, Respondent's attorney, states Complainant's statement that four employees were promoted to the position of Head Cashier (Bookkeeper) in Kankakee is false. Only one person was promoted to that position during 1976 (see Exhibit A.) The individual promoted to Bookkeeper had more seniority than Complainant and had in the past been a Bookkeeper for Respondent (see Exhibit B.) Mr. Berrmann states Respondent has no files on any employees by the name of D. Martin or Lucille Horton. Ms. Joan Horstmann was hired by Respondent as a part-time clerk and back-up Bookkeeper and has not been promoted to Bookkeeper (see Exhibit D), she also had more seniority than Complainant in a full-time capacity.

Mr. Berrmann states there were no promotions to Assistant Manager during 1976 at the Kankakee location (see Exhibit C.)

Mr. Daniel H. Daley, Caucasian, Respondent's Personnel Director, states as of 1/77 a program was designed specifically for Complainant to become a Head Cashier (Bookkeeper). Since the completion of Complainant's program, Complainant has been assigned the duties as an assistant Head Cashier

JoAnn Ford Box
Charge Nos: 1977CFO258, 1977CNO261

(Bookkeeper). Mr. Daley states Complainant will be considered for Head Cashier when an opening occurs.

3. *Employment Statistics*

Respondent's EEO-1 report for 1976 indicates job category—clerical:

Total employees:

Total 40

Black (10%)

4. *Staff Note*

Complainant concurs that in 1/77 she was assigned the duties of an assistant Head Cashier (Bookkeeper) upon completing Respondent's program, in which she was trained for four weeks in bookkeeping.

B. Complainant stated in 6/77, Mr. Daley called Complainant and asked her to come into Chicago to interview for the Manager Trainee Program. Complainant stated she declined because she was getting married and also she thought Mr. Daley was trying to set her up.

C. *Conclusion*

Documentation does not indicate in any way that Complainant was denied a promotion because of her race, Black. The individual promoted to Bookkeeper in 76 had more experience, training and seniority than Complainant. Evidence indicates there were no promotions to assistant managers in 1976 by Respondent.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
536 South Clark Street
Chicago, Illinois 60605
Telephone 353-2713

IN REPLY REFER TO:

Charge No. 051742965

Ms. JoAnn Ford Box
1315 Banks Avenue
Rockford, Illinois 61102 — Charging Party

A & P Foods
2215 E. Court
Kankakee, Illinois 60901 — Respondent

DETERMINATION

Under the Authority vested in me by 29 CFE 1601.21 (d) of the Commission's Procedural Regulations (September 23, 1977), I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and the timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded the Illinois Fair Employment Practices Commission findings relating to the subject charge.

Having examined the findings of the Illinois Fair Employment Practices Commission and the record presented, I conclude that there is not reasonable cause to believe that the Respondent has violated Title VII of the Civil Rights Act of 1964, as amended, in the manner alleged.

This determination concludes the Commission's processing of the subject charge. Should the Charging Party wish to pursue this matter further, the Charging Party may do so by filing a

private action in Federal District Court within 90 days of the receipt of this letter and by taking the other procedural steps set out in the enclosed NOTICE OF RIGHT TO SUE.

On Behalf of the Commission

Date: April 10, 1980

MARTIN SLATE
District Director

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NOTICE OF RIGHT TO SUE
(Dismissal)

TO:	FROM:
Ms. JoAnn Ford Box 1315 Banks Avenue Rockford, Illinois 61102	Equal Employment Opportunity Commission Chicago District Office 536 South Clark Street, Room 234 Chicago, Illinois 60605

CHARGE NUMBER	EEOC REPRESENTATIVE	TELEPHONE NUMBER
051762895	Mary Jane Watt	(312) 353-7695

(See Section 706(IXI) and (IX3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued because the Commission has dismissed your charge.
Your charge was dismissed for the following reason:

☐ No jurisdiction, therefore the Commission has no authority to process your charge further.

☒ No reasonable cause was found to believe that the allegations made in your charge are true, as indicated in the attached determination.

☐ You failed to provide requested necessary information, failed or refused to appear or be available for necessary interviews/conferences or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You have had more than 30 days in which to respond to our final written request.

☐ The Commission has made reasonable efforts to locate you and has been unable to do so. You have had at least 30 days in which to respond to a notice sent to your last known address.

☐ The respondent has made a written settlement offer which affords full relief for the harm you alleged. At least 30 days have expired since you received actual notice of this settlement offer.

The issuance of this NOTICE OF RIGHT TO SUE terminates the Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in United States District Court. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE OF RIGHT TO SUE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f)(1) permits the U.S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U.S. District Court in the form and manner it requires. Your request to the U.S. District Court should be made well in advance of the end of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U.S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission
MARTIN SLATE
(Typed Name and Title of EEOC Official)
Martin Slate District Director

April 10, 1980
(Date)

A & P TEA COMPANY
Edward W. Bergmann, Esq.

CHARGE OF DISCRIMINATION

IMPORTANT: This form is affected by Privacy Act of 1974; see Privacy Act Statement on reverse before completing it.

B-180541 (RO512) ☐ STATE/LOCAL AGENCY
Expires 1-21-81 ☐ EEOC 05178 2869

Fair Employment Practices Commission and Equal Employment Opportunity Commission
(State or Local Agency)

NAME (Indicate Mr., Ms., or Mrs.) HOME TELEPHONE NUMBER (include area code)
Paula Brockhouse 217-245-4624

STREET ADDRESS
517 W. Greenwood

CITY, STATE, AND ZIP CODE COUNTY
Jacksonville, Illinois 62650 Morgan

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME. (If more than one list below).

NAME TELEPHONE NUMBER (include area code)
A. & P. Grocers 217-245-6812

STREET ADDRESS CITY, STATE, AND ZIP CODE
Lincoln Square Shopping Center
Jacksonville, Illinois 62560

NAME TELEPHONE NUMBER (include area code)

STREET ADDRESS CITY, STATE, AND ZIP CODE

EXHIBIT E

CAUSE OF DISCRIMINATION BASED ON MY (Check appropriate box(es)

☐ RACE ☐ COLOR ☒ SEX ☐ RELIGION
☐ NATIONAL ORIGIN ☐ OTHER ((Specify)
Female

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE (*Month, day, and year*)

THE PARTICULARS ARE:

I. In November 1970 I was employed as a checker with A & P. On August 25, 1975 I was terminated from this position.

II. Don Howard, Manager, informed my Supervisor Mr. Macjna, to terminate me because I had four write ups.

III. I believe I've been discriminated against on the basis of my sex in that:

A. Don Howard continually harassed me and did almost anything to ca me to make mistakes. He is unfair to all females employed.

B. To my knowledge he never treats any of the males this way.

C. One time Don Howard wrote me up, without my knowledge. The union called me to see if I was aware of it.

RECEIVED

Sep. 21, 1978

EEOC
CHICAGO MODEL OFFICE

BK/jv

I also want this charge filed with the EEOC.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (Day, Month, and year)

NOTARY—(When necessary to meet State and Local Requirements)

I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

IN THE MATTER OF

PAULA BROCKHOUSE
COMPLAINANT(S).

AND

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
RESPONDENT(S).

CHARGE NO(S).
1979SFO133

ORDER

This matter coming before the Commission upon Complainant's request for reconsideration filed in accordance with Section 4.5 of the Commission's Rules and Regulations; and the Commission having reviewed the investigation report of its staff together with Complainant's request and supporting materials; and the Commission being fully advised in the premises;

NOW, THEREFORE, it is hereby ORDERED that this matter is DISMISSED on the following ground:

- ☒ LACK OF SUBSTANTIAL EVIDENCE
- ☐ LACK OF JURISDICTION
- ☐ COMPLAINANT'S FAILURE TO PROCEED

In Support of which determination the Commission states the following findings of fact and reasons:

1. Complainant was employed by Respondent as a Checker from October 23, 1974 to August 24, 1978.
2. Complainant's employment was terminated by Respondent after Complainant received her fourth write-up for carelessness, and excessive cash shortages and overages in a six (6) month period.

EXHIBIT F

3. Complainant contends that the manager of Respondent's Jacksonville store harassed her and caused her to make mistakes as to the amount of money in her cash register. Complainant further contends that the manager did not treat the male employees in the same manner. However, the investigation does not reveal substantial evidence that Respondent harassed or otherwise treated Complainant any differently than the male employees. Rather, witness statements obtained from eleven (11) employees (six females and five males) indicate that:

    A. The manager of the store demands a lot out of all of the employees and has warned both male and female employees of work rule infractions.

    B. Rules are not given preferential treatment with respect to the quality of work expected.

    C. Complainant had difficulty getting along with the manager of the stores and on occasion unnecessarily instigated or escalated disputes.

ENTERED THIS 16TH DAY OF MAY, 1979

FAIR EMPLOYMENT PRACTICES COMMISSION

RETURN RECEIPT REQUESTED

BY: _____

CAROL M. FREDERICK,
Chairperson

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NOTICE OF RIGHT TO SUE
(Dismissal)

TO:	FROM:
Paula Brock House 517 W. Greenwood Jacksonville, Ill 62650	Equal Employment Opportunity Commission Chicago District Office 536 South Clark Street, Room 234 Chicago, Illinois 60605

CHARGE NUMBER	EEOC REPRESENTATIVE	TELEPHONE NUMBER
051782869	Sandra Gumm	(312) 353-6649

(See Section 706(f)(1) and (f)(3) of the Civil Rights Act of 1964 on reverse of this form.)

This is your NOTICE OF RIGHT TO SUE. It is issued because the Commission has dismissed your charge. Your charge was dismissed for the following reason:

☐ No jurisdiction, therefore the Commission has no authority to process your charge further.

☒ No reasonable cause was found to believe that the allegations made in your charge are true, as indicated in the attached determination.

☐ You failed to provide requested necessary information, failed or refused to appear or be available for necessary interviews/conferences or otherwise refused to cooperate to the extent that the Commission has been unable to resolve your charge. You have had more than 30 days in which to respond to our final written request.

☐ The Commission has made reasonable efforts to locate you and has been unable to do so. You have had at least 30

EXHIBIT G

days in which to respond to a notice sent to your last known address.

☐ The respondent has made a written settlement offer which affords full relief for the harm you alleged. At least 30 days have expired since you received actual notice of this settlement offer.

The issuance of this NOTICE OF RIGHT TO SUE terminates the Commission's processing of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge in United States District Court. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) DAYS FROM THE RECEIPT OF THIS NOTICE OF RIGHT TO SUE; OTHERWISE YOUR RIGHT TO SUE IS LOST.

If you cannot afford or have been unable to obtain a lawyer to represent you, you should be aware that the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5(f)(1) permits the U. S. District Court having jurisdiction in your case to appoint a lawyer to represent you. If you plan to request appointment of a lawyer to represent you, you must make this request of the U. S. District Court in the form and manner it requires. Your request to the U. S. District Court should be made well in advance of the end of the 90-day period mentioned above.

You may contact the EEOC representative named above if you have any questions about your legal rights including advice on which U. S. District Court has jurisdiction to hear your case or if you need to inspect and copy information contained in the Commission's case file.

An information copy of this Notice of Right to Sue has been sent to the respondent(s) shown below.

On Behalf of the Commission

06/01/79
(Date)

MARTIN SLATE (D.R.)
(Typed Name and Title of EEOC Official)
Martin Slate, District Director

APPENDIX K

IN THE UNITED STATES DISTRICT COURT

For the Northern District of Illinois

Eastern Division

VARNADO CHAFFEE, et al., *Plaintiffs,* v. A & P TEA COMPANY, et al., *Defendants.*	No. 79 C 2735
WILLIE J. WEST, et al., *Plaintiffs,* v. A & P TEA COMPANY, et al., *Defendants.*	No. 79 C 3625
WILLIAM R. WEST, *Plaintiff,* v. THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., *Defendant.*	No. 79 C 4332
JoANN FORD BOX, et al., *Plaintiffs,* v. A & P TEA COMPANY, *Defendant.*	No. 79 C 4359 Judge Joel Flaum

DEFENDANT A&P'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON THE SEX DISCRIMINATION CLAIMS OF JoANN FORD BOX AND PAULA BROCKHOUSE

A. Plaintiffs Have Failed Adequately To Rebut Defendant A & P's Showing That Summary Judgment Should Be Granted On The Sex Discrimination Claims Of JoAnn Ford Box.

JoAnn Ford Box, a black, female, former cashier at A & P, is one of two plaintiffs to allege sex discrimination and the sole plaintiff to combine both race and sex discrimination claims. In its original memorandum in support of the instant motion, Defendant A & P cited substantial evidence that Plaintiff Box never brought a sex discrimination charge before the EEOC in the first instance, nor could she have done so in view of the substance of her claim. Def. Memorandum at 3-4.

Plaintiff Box in an affidavit attached to the Plaintiff's Memorandum In Opposition now insists that she did, in fact, check the "sex" box when she first filed the EEOC charge and she intended to bring a sex charge.[1] Summary judgment must still be granted, however, because it is undisputed that va-

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[1] In addition to her statements about her EEOC charge, in paragraphs 4 and 5 of her affidavit Box makes some generalized and unsubstantiated charges against Defendant. These paragraphs do not conform with Rule 56(e), F.R.C.P., which expressly requires that in connection with summary judgment motions:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall affirmatively show that the affiant is competent to testify to the matters stated therein.

An affidavit should be disregarded if it contains conclusory statements, statements beyond the affiant's personal knowledge, argument or otherwise inadmissible evidence. *Ashwell & Co., Inc. v. Transamerica Ins. Co.*, 407 F.2d 762, 766 (7th Cir. 1969); *Monroe v. United Air Lines, Inc.*, 27 EPD ¶ 32,230 at 22,686 (N.D. Ill. 1981) (J. Shadur); *Cohen v. Ayers*, 449 F. Supp. 298, 321 (N.D. Ill. 1978) (J. Marshall). Here, paragraphs 4 and 5 must be disregarded because they recite nothing more than conclusory allegations and alleged statements without laying any foundation or citing any facts.

cancies in the job she claimed she was disriminatorily denied—bookkeeper—were filled exclusively by females.

Indeed, Plaintiff Box's letter to the EEOC dated January 13, 1975 (attached to Plaintiffs' Memorandum as Exhibit B), which is the best evidence of what she intended to charge, states that she claims a discriminatory refusal of a bookkeeper position which, she contends, has "always been filled by white females." Similarly, Plaintiff Box's full EEOC questionnaire (attached hereto as Exhibit A; portions of which are attached to Plaintiffs' brief as Exhibit C) show that she claimed only the bookkeeper job (¶¶ 4, 22, 29) and that all persons whom she alleges received the vacancies she claimed she was denied are female (¶ 21). Finally, the Investigation Report from the Fair Employment Practices Commission states that all persons promoted to the bookkeeper position she sought were women (Ex. C to Defendant's Initial Memorandum, page 2).

In short, Plaintiff may be able to assert a race claim which respect to the claimed denial of a bookkeeper position, but the undisputed facts show that she cannot assert a sex claim because all persons who allegedly received vacancies which she sought were women. Moreover, any other claim she might seek to assert must be dismissed as beyond the scope of her EEOC charge (see cases cited at pp. 7-8 of Company's Memorandum) or because she cannot cite any facts to support the claim so summary judgment is appropriate (see cases cited at pp. 1-2 of the Company's Initial Memorandum).

B. Plaintiffs Have Failed Adequately To Rebut Defendant A & P's Showing That Summary Judgment Should Be Granted On Plaintiff Brockhouse's Claims.

Paula Brockhouse is a white, female, former cashier who alleges only sex discrimination. In its original memorandum in support of the instant motion, Defendant A & P demonstrated that Brockhouse's discipline and discharge claims lack any

evidentiary support and that the additional allegations in her complaint must be dismissed as beyond the scope of her EEOC charge.

Plaintiffs assert that Brockhouse's claims regarding job assignment, promotion and transfer were subsumed within her original EEOC charge. In this connection, they point to language in the charge alleging that Don Howard, her last store manager, "was unfair to all females employed" in the store. Plaintiffs' Memorandum at 5, 6. However, this language would not be sufficient to satisfy the administrative prerequisite for any other claim because the EEOC regulations provide that a charge must contain "a clear and concise statement of the facts, including pertinent dates constituting the alleged unlawful employment practices . . ." 29 CFR § 1601.12(a)(3) (1980).

Not surprisingly, therefore, Plaintiffs ignore the *charge* completely and launch into a "description" (without citation) of the systemic discrimination *alleged* in Brockhouse's *complaint, deposition* and *affidavit*. *Id.* at 5. In so doing, Plaintiffs once again fail to recognize that application of the *Jenkins* "like or reasonably related" test is governed by the Plaintiff's charge and the subsequent administrative investigation. The scope of the administrative proceedings determines the permissible scope of claims that may be litigated in a subsequent court suit, not vice versa.

The investigation report to the Illinois FEPC shows that the investigation focused only on discharge and disciplinary practices in the particular store in which Brockhouse was employed. Exhibit B attached hereto. *See also* Defendant's Initial Memorandum, Ex. F. In other words, the alleged "unfair treatment" was equated with alleged discrimination in discipline and discharge, not in promotion, transfer and other practices. There is no indication that the EEOC took any different view of the scope of the charge.

In any event, voluminous circumstantial evidence makes it clear that Brockhouse never intended her administrative charges to encompass the broad range of claims Plaintiffs now

assert. Brockhouse worked at a single store during the entire period of her employment with A & P. Brockhouse Dep. at 12. The record contains no indication that she was even acquainted with employees from other stores. Far from begin subjected to a pattern or system of discrimination even at that one location, Brockhouse testified that she worked under six different managers over a six-year period, four of whom never disciplined her at all. *Id.* at 10-16. A fifth manager allegedly gave general warnings to all females at the registers about overages and underages (*id.* at 14-15), but it was only her last manager, Don Howard, who ever actually took disciplinary action against her (*id.* at 15-19). As for possible promotion and transfer claims, Brockhouse testified that she had never applied for a bookkeeper position (*id.* at 4), had never expressed an interest in an assistant manager's position (*id.* at 5), and had never desired or sought a transfer (*id.* at 43).

In sum, Brockhouse's own testimony establishes that her administrative charges and the resulting investigations were confined to claims of discrimination in discipline and discharge.[2] Her promotion, transfer and assignment claims must

[2] Despite the limited claims asserted at her deposition Brockhouse has now filed an affidavit which makes some generalized claims of discrimination. This affidavit must be disregarded because of its failure to meet the Rule 56(e) requirements. *See* discussion and cases at page 2, n. 1, *supra*. In view of Brockhouse's admittedly limited exposure to the Company's operations, Plaintiffs were under an affirmative duty to show she was competent to testify to alleged system-wide practices. F. R. Civ. P. 56(e). At least two paragraphs of the affidavit admittedly are based on belief instead of the requisite personal knowledge. Plaintiffs' Memorandum, Ex. H, paragraphs 4 and 10. Other portions contain inadmissible hearsay statements and a variety of legal and factual conclusions. Indeed, the affidavit is nothing short of a transparent effort on the part of Plaintiffs' counsel to attribute *their* legal theory in the case to Plaintiff Brockhouse. Such a practice has been severely criticized in this district and is in obvious contradiction of Rule 56(e). *Monroe v. United Air Lines, Inc.*, 27 EPD ¶ 32,230 at 22,686 (N.D. Ill. 1981) (J. Shadur).

be dismissed, therefore, as exceeding the scope of her charge. *Abraham v. Field Enterprises,* 511 F. Supp. 91, 93 (N.D. Ill. 1980); *Harris v. Caterpillar Tractor Co.,* 18 FEP Cases 765, 766 (S.D. Ill. 1978); *Conrad v. AMP, Inc.,* 20 FEP Cases 905, 906 (M.D.N.C. 1979).

Plaintiffs' correlative contention that Brockhouse can challenge A & P's assignment, promotion and transfer practices even if outside the scope of her charge is completely without merit. Indeed, their proposition that Brockhouse, without a charge, can challenge promotion practices *as a class representative* simply because Box filed a promotion discrimination charge is not supported by the decisions on which Plaintiffs rely and is contrary to the requirements of Rule 23(a). See Plaintiffs' Memorandum at 7. *Chisholm,*[3] *Batiste*[4] and *Oatis*[5] each stand for the general proposition that the filing of an EEOC charge is not a necessary prerequisite for class *membership.* Nothing in these decisions dispenses with the Rule 23 requirements that class membership nevertheless be predicated on some identity of claims among class members. The importance of these requirements is underscored by the decisions in *Crawford*[6] and *Allen*[7] which permitted joinder in non-class action suits of certain plaintiffs who had not filed individual EEOC charges, but *only* upon a finding that their substantive claims were virtually identical to those of the original plaintiffs. In short, by joining other (but unrelated) plaintiffs in a class action suit, Brockhouse cannot be permitted to litigate claims she would not be permitted to litigate if proceeding as an individual.

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[3] *Chisholm v. U.S. Postal Service,* 27 FEP Cases 425, 431 (4th Cir. 1981).

[4] *Batiste v. Furnco,* 503 F.2d 447, 451 (7th Cir. 1973).

[5] *Oatis v. Crown Zellerbach Corp.,* 398 F.2d 496 (5th Cir. 1968).

[6] *Crawford v. U.S. Steel Corp.,* 27 EPD ¶ 32,208 at 22, 621-22 (5th Cir. 1981).

[7] *Allen v. Amalgamated Transit Union Local 788,* 554 F.2d 876, 882 (8th Cir. 1977).

Finally, Plaintiffs argue that Brockhouse has made out a *prima facie* case of discriminatory discipline by alleging that even if she was guilty of the offenses charged, the Company engaged in disparate treatment by not punishing men for the same offenses. The only evidence offered in this connection appears in paragraph 7 of Brockhouse's affidavit in which she avers that "while she was employed," a male employee named Lance Gardner had several cash shortages for which he was not disciplined. She has not shown, however, that these events occurred during the time Don Howard was store manager. Since Don Howard (who is specifically named in her charge) was the only one of six managers to discipline Brockhouse, no disparate treatment claim is made out where Plaintiffs have failed to show that the same manager declined to discipline a male employee for the same offense.

CONCLUSION

Based on the foregoing, summary judgment should be granted for Defendant on Plaintiff Box's claim of sex discrimination and on Plaintiff Brockhouse's claim in its entirety.

Respectfully submitted,

Edward W. Bergmann
Michael A. Warner
Jill A. Goldy
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

By /s/ JILL A. GOLDY
Jill A. Goldy
One of the Attorneys for Defendant, The Great Atlantic & Pacific Tea Company

SEYFARTH, SHAW, FAIRWEATHER
& GERALDSON
55 East Monroe Street
Chicago, Illinois 60603
(312) 346-8000

Dated: May 3, 1982

CHARGING PARTY PROMOTION/TRANSFER QUESTIONNAIRE

You have alleged in your charge that you were illegally discriminated against by being denied a promotion or transfer by your employer. We need the following information from you. (Please think carefully before answering each question because you are asked at the end of the questionnaire to declare under penalty of perjury that your answers are correct.)

1. Date of hire: 7/23/65

   Job Title at Hire: Cashier

   Unit and/or Department at Hire: Cash register

   Pay rate at Hire: $1.77 per hr.

2. Number of times you were promoted between date of hire and date you applied for the promotion/transfer. None

3. Job title at time you sought promotion or transfer: Cashier

   Unit and/or Department: cash-register

   Pay Rate: —

4. Title of job to which you sought promotion or transfer: Book-Keeping Trainee

   Unit and/or Department: Management

   Pay Rate: —

5. Explain the relationship between the job for which you applied and the job you held at the time you applied: more money and further responsibilities to move up within the company

6. How did you learn about the job (Job announcement, fellow employee, your supervisor, etc.): fellow employee

   If you have a copy of the job announcement, please return it with this questionnaire.

EEOC Form 315 (TEST)-BL#7c

EXHIBIT A

7. How did you apply for the job (in writing—by letter or bid sheet, asking your supervisor, etc.): Asking supervisor

   If you applied in writing and have a copy of the application, please return it with this questionnaire.

8. When did you apply for the promotion/transfer?
   Date: 8/71

9. How many openings existed in the job for which you applied? 1 opening

10. Were you interviewed for the job? Yes ____ No ✓. If so, give the following information about the person who interviewed you.

    Name: _____

    Title: _____

    Race, Sex, National Origin or Religion: _____

11. What did this person say to you about the job?

    _____

    _____

    _____

12. What did this person ask you in the interview?

    _____

    _____

    _____

13. Were you given a trial period on the job for which you applied? Yes ____ No ✓. If yes, describe the trial period (length of time, kind of training, kind of supervison, etc.):

    _____

    _____

14. Were other employees given trial periods?
Yes ____ No ____.

15. What qualifications are necessary for promotion or transfer to the job you sought?

a. Length of service in a particular job?
Yes ____, No ✓. If yes, explain: _____

_____

Length of service in a particular department?
Yes ✓ No ____. If yes, explain: _____

_____

Length of service with the company?
Yes ____, No ✓. If yes, explain: _____

_____

Do you have, as required, the necessary length of service in the job, department, company? Yes ✓, No ____. Explain:

_____

_____

b. Specific educational requirements? Describe: No

Do you meet these educational requirements?
Yes ✓ No ____.

Explain: _____

_____

c. Specific training? Basic office procedures

Does this company provide this training either formally or informally? Yes Both

Have you taken this training? Explain: Yes the informal

d. Supervisor's recommendation? Yes ____ No ✓
Explain:

_____

_____

Did you have your supervisor's recommendation?
Yes ✓ No ____ Explain: supervisor did in 2/76

e. Testing? Yes ____, No ✓ If any tests were required, please describe them, if you took them, and how you did on them (if you were told):

_____

_____

16. How and when were you notified that you had not been selected for the position you sought? Wasn't notified or wasn't selected

If you received a written notice and have a copy of that notice, please return it with this questionnaire.

17. What reasons were you given for not being selected? None, no response.

18. What is your answer to the reason(s) given you for not being selected for the promotion or transfer? (If what was said was not true, explain what was inaccurate. (If the reason was not a misstatement of facts, explain what it is that leads you to think it was not the real reason.)

Because I feel as though I wasn't selected is because of my color which is Black. Also that I was a female.

19. Do you know who made the final decision not to promote or transfer you? Yes ____ No ✓ If yes, please indicate:

Name _____

Job Title _____

Unit and/or Department _____

His/her Race, Sex, National Origin or Religion _____

20. If the person you named in question 19 supervises a number of people, please indicate how many. _____ Are the people s/he supervised mostly of the same race, sex, national origin, or religion? Yes ____, No ____. Please describe the job classifications under the supervisor's supervision, the number of people in each type of job, and, as appropriate to your charge, the race, sex, national origin, or religion of those persons. (For example, if your charge alleges discrimination based on sex, you would list the job classifications and the number of men and women employed in each classification.)

Job Classification	Number of persons by race, sex national origin or religion

21. Who got the job or jobs for which you applied? If you do not know the person's full name, tell us whatever you can about the person that would help identify him/her.

Name	Job Title & Dept. in which this person worked before promotion/transfer	One of the Following: Race, Sex, National Origin or Religion
a. D. Martin	F	White—Bookkeeping
b. Joan	Horseman	F—White
c. Lucille	Horton	F—White
d. _____		
e. _____		

22. To the best of your knowledge, do you know of any way in which the person or persons selected for the job were not qualified or were less qualified than you? Explain.

    a. Yes. All of them had no previous bookkeeping experience.

    b. _____

    _____

    c. _____

    _____

    d. _____

    _____

    e. _____

    _____

23. Do you know of any other employees who applied for the same job and who, like you, were also not selected? If so, please list below.

Name	Job Title	Unit and/or Department	One of the following Race, sex, national origin or religion

    No

24. Please describe the people who presently hold the job for which you applied in terms of their race, sex, national origin or religion.

    All females—White

25. How often were you evaluated by your employer? Never

    Who evaluated you the last time?

    Name: _____

    Job Title: _____

    Unit and/or Department: _____

    Race, Sex, National Origin or Religion: _____

26. What was your evaluation like:

    _____ Above average

    _____ Satisfactory

    _____ Unsatisfactory

27. Have you ever received warnings about violations of company rules? Yes ✓ No ____. If yes, please describe the warnings—who gave them to you? When? Were they in writing? What were they for?

    Cash shortage—Manager Sol Junior, were in writing.

28. Are there any people who have specific information about your being denied the transfer or promotion? Please give us their names.

	Name	Job Title	Unit and/ or Department	One of the Following: Race, Sex, Nat'l Orig. or Religion	Home Phone Number
a.	Ruth Jones	Cashier		White Female	(315) 932-8406
b.	Alicia Johns	Cashier		Black Female	
c.					
d.					
e.					

29. Please indicate for each person listed in question 28, exactly what information they can provide the Commission.

    a. Any information pertaining to the bookkeeping position

    b. _____

    _____

    c. _____

d. _____

e. _____

30. Do you still wish a transfer or promotion to the job for which you applied? Yes, trainee management

31. If you have other information you wish to present to the Commission at this time that will help us understand the circumstances surrounding your failure to be promoted/transferred, please use space below.

    No

If you need more space to answer any of these questions, you may attach additional sheets.

I declare (certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on 3-6-78

/s/ JoAnn Ford-Box
(Signature)

STATE OF ILLINOIS
FAIR EMPLOYMENT PRACTICES COMMISSION
INVESTIGATION REPORT

TO: COMMISSIONERS FEPC No. 1979Sfo133
FROM: Carol Lee Huff/cm EEOC No. 051782869
DATE: February 6, 1979
RE: **COMPLAINANT** **RESPONDENT**

Paula Brockhouse — A & P Grocers
Jacksonville — Jacksonville

* * * *

I. *Recommendation*
Dismiss/Lack of Substantial Evidence

II. *Allegations/Basis/Section*
Termination/Sex, Female/3(a)
Harassment

III. *Supervisor* _____ 2/6/79

IV. *Review Team* _____

V. *Dates*

Alleged Violation	August 26, 1978
Charge Filed	September 18, 1978
Stipulation Date	None

VI. *Respondent's Type of Operation*
Food Store

VII. *Union Involvement*
Retail Clerk's Local Union #35.
Grievance was filed and then dropped by Union.

VIII. *State Bidder*
No

IX. *Employment Data*

Total Females	10	Total Male Checkers	1
Total Males	14	Total Female Checkers	8
Total Employees	24	Total Checkers	9

EXHIBIT B

Investigation Report, Paula Brockhouse, 1979SFO133

X. *Findings*

A. *Summary of Charge:*

Complainant alleges she has been discriminated against because of her sex, female. Complainant alleges the Respondent continually harassed her, causing Complainant to make mistakes for which she was written up and, therefore, terminated. Complainant alleges the Respondent is unfair to all female employees and does not treat male employees in this fashion.

B. *Facts:*

1. Complainant was employed by the Respondent, as a checker, on November 14, 1970.
2. Complainant resigned from Respondent's employment on November 25, 1972, due to pregnancy and her doctor's recommendation.
3. Complainant was rehired by the Respondent, as a checker, on October 23, 1974.
4. Complainant received a write-up notice on January 3, 1978, for carelessness, quality of work and failure to follow company policy in regards to taking a forged check, which was later taken out of her personnel file per a Union discussion. (Exhibit A)
5. Complainant received her first write-up notice on March 1, 1978, for carelessness and excessive cash shortages or overages in regards to her register being $4.40 (Four Dollars and Forty Cents) short. (Exhibit B)
6. Complainant received her second write-up notice on April 1, 1978, for carelessness, excessive cash shortages or overages and quality of work in re-

gards to her register being $4.50 (Four Dollars and Fifty Cents) over. (Exhibit C)

7. Complainant received her third write-up notice on August 23, 1978, for carelessness and excessive cash shortages or overages in regards to her register being $2.96 (Two Dollars and Ninety-Six Cents) short, because of changed figures. (Exhibit D)

8. Complainant received her fourth write-up notice on August 24, 1978, for carelessness and excessive shortages or overages in regards to her register being $9.50 (Nine Dollars and Fifty Cents) over, and was, therefore, terminated. (Exhibit E)

C. *Contested Issues:*

1. Was the Complainant's termination because of her sex, female?

Complainant's Position:

The Complainant alleges the Respondent, Mr. Don Howard, harassed her continuously in order to make her upset, causing her to make mistakes in the amount of money in her cash register for which she was responsible. Because of the continued harassment which caused her mistakes the Respondent would write her up for either the overages or shortages, therefore, resulting in her termination.

Complainant alleges the Respondent does not treat the male employees in the same manner as the females. The males are given preferential treatment, whether they are stockers or checkers. The males do not have to be responsible or accountable for the money in the "speed" register, on which they operated, as she did.

Investigation Report, Paula Brockhouse, 1979SFO133

Respondent's Position:

The Respondent alleges the Complainant's termination was precipitated by her own actions. The termination of the Complainant was based on her receiving her fourth excessive cash register shortage or overage, within the last six (6) months and the second day in which Complainant was "careless" in properly balancing her register drawer.

The Respondent alleges all cash shortages and overages are written-up. The write-up the Union called on concerning the Complainant had been removed from her personnel file and was not used in consideration to terminate the Complainant.

The Respondent states, on many occasions the Complainant had been verbally warned concerning her behavior and written notices were not issued concerning these matters, as the Respondent was giving the Complainant a chance to change. The repeated warnings from the Respondent to the Complainant was not harassment on the part of the Respondent.

The Respondent alleges all employees are treated the same way whether female or male. The males are not given preferential treatment concerning their running of cash registers. Many of the male employees are assigned other duties throughout the store such as, stocking shelves, unloading trucks, and marking products.

When there are quite a few customers waiting to be checked out, the males may be called on to help out. A few males may be assigned to sacking groceries and some males may be assigned to the "speed" register, if need be. The "speed" register

consists of the fast service line of eight (8) items or less. This enables customers with only a few items to check out faster with less waiting time. Male employees who do not normally run cash registers, will only be assigned to the "speed" register if there is no office personnel to do so, such as at night after about 6:00 PM when normal office personnel would go home. Any person assigned to the "speed" register is responsible for the money they take in. The store manager is responsible to make sure the "speed" register drawer used is balanced at the end of the day.

Staff Notes:

There is no way to know how many persons are assigned to the "speed" register during a day's operation. No listings are kept as to what amount of money is brought in by a particular person who runs the "speed" register.

Witnesses:

Staff personally interviewed eleven (11) witnesses on November 16, 1978. (Exhibit F) Witnesses comments reflect the following:

#1 *Male:*

Doesn't feel the Respondent treats anyone differently. Remembers Complainant slamming and breaking the office door after receiving a write-up notice.

#2 *Female:*

Feels the Complainant makes remarks and then denies them when confronted. Complainant started a rumor to get back at the Respondent by saying he was queer and that he was stepping out on his wife. The Complainant purposely instigated

trouble in the store. When the Respondent first came here, to the store, I thought they got along but recently she would mouth him for no reason. She busted the office door because she was mad about a write-up she received. I, myself, have received write-ups but they were my fault and now I know what I was doing wrong. I was new to this kind of work, but the Complainant wasn't new to it.

#3 *Female:*

The Complainant can't mind her own business. She could do a good job if she wanted to. She didn't seem to care, when I warned her several times her job was in jeopardy. The Respondent expects a lot out of his employees and in return he gives 100% of himself. The Respondent never yelled at the Complainant. The Complainant would pass rumors, she always kept things stirred up, things are better around her now without the Complainant. The Complainant ran through over 3,500 items one day and never had a void. She wound up with an overage, so she thought she could hold back on the coupons to cover it. It didn't work. She played these types of games.

#4 *Female:*

Only knew the Complainant needed the job. The Respondent would talk to everyone the same way, he was alright to me.

#5 *Male:*

Doesn't feel the Complainant could keep her mind on her work. The Complainant was okay but I really never liked working with her. She would talk to anyone about anybody, it didn't matter. Never considered any warnings as a form of harassment.

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#6 *Male:*

The Complainant called the Union plenty of times concerning other peoples behavior to see if action could be taken and most times any problems were settled between the employer and employee. The Respondent is demanding on everyone and he works hard, we all have too. I listened to her one day ask the Respondent if he was queer, she put him right on the spot, but nothing was said back to her. It is a good atmosphere here now.

#7 *Male:*

The Complainant was a rumor monger. I think the Respondent gave her more breaks than he would give a male. She would call the Union every chance and try to file grievances for other people. I had problems with the Respondent because he wants things done his way, but it is the way it should be done. The other managers never really cared. The store is quieter now, there is less friction.

#8 *Female:*

The Complainant was two-faced. She was always busy talking and never worried about her checking. I don't believe there is any preferential treatment except on the part of Respondent to the Complainant. The Respondent went out of his way to help her and she would gossip about him and write letters to the District Manager. Basically she was out to get him. The atmosphere is better now.

#9 *Female:*

I can't see where the females are treated any differently than the males, in fact we may be treated better than the males in some respects. The

Respondent is very likeable and is doing good for this store in comparison to previous managers.

#10 *Male:*

I never put much stock in what the Complainant said. The Respondent expects you to work hard. I've been chewed out by the Respondent but I wasn't doing my job right. The place is quieter now.

#11 *Female:*

The Complainant did her job and everybody else's. She spread rumors you wouldn't believe. She ran her register tapes and did try to force the figures. I had to straighten them out a couple of times. The Respondent doesn't treat anyone better than anyone else. He gave the Complainant more chances than anyone else would have given her. She always seemed to be out to pick on him, not vice-versa.

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D. *Comparative Data:*

Corrective Action Notices written by Respondent from September 10, 1977 to August 23, 1978. (Exhibit G)

	Name	Position	Sex	Date of Action	Reason For Action
1.	Carol Edmunds	Checker	Female	9-10-77	Carelessness Quality of work.
2.	Darlene Rogers	Checker	Female	1-15-78	Customer complaint. Carelessness
3.	Carol Edmunds	Checker	Female	1-18-78	Failure to follow company policy.
4.	Carol Edmunds	Checker	Female	2-26-78	Carelessness, excessive shortage or overage.
5.	Mary Darwent	Checker	Female	3-27-78	Carelessness, excessive shortage or overage.
6.	Darlene Rogers	Checker	Female	4-1-78	Carelessness, excessive shortage or overage, quality of work.

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XI. *Reasons for Recommendation:*

A. Complainant did receive four (4) write-up notices for excessive overages and shortages.

B. Statements from five (5) male and six (6) female witnesses do not support Complainant's allegation of unfair treatment to female employees.

C. There is only one male checker and a review of his personnel file and comparative data indicates no record of overages and shortages.

D. Complainant failed to meet the Respondent's expected standards of employment.

No. 85-1353

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOANN FORD BOX,

Petitioner,

v.

A&P TEA COMPANY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

GEORGE F. GALLAND, JR.*
PAUL L. STRAUSS

DAVIS, MINER, BARNHILL
& GALLAND
14 West Erie Street
Chicago, IL 60610
(312) 751-1170
Counsel for Petitioner
JoAnn Ford Box

*Counsel of Record

Pandick Midwest, Inc., Chicago • 733-6000

IN THE

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OCTOBER TERM, 1985

JOANN FORD BOX,

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A&P TEA COMPANY,

Respondent.

As the petition for *certiorari* showed, this case will be governed by this Court's disposition of *Celotex Corp. v. Catrett,* No. 85-198, *cert. granted* 106 S.Ct. 342 (1985). In *Celotex,* the Court of Appeals majority held that a movant must support its motion for summary judgment with evidence. Judge Bork, dissenting, argued that the showing required on a summary judgment motion need not always be made through evidence, but he cautioned that summary judgment should not be granted against a plaintiff for failure to produce evidence unless the plaintiff was specifically challenged to produce that evidence in the district court.

In this case the principles of both the majority and dissent in *Celotex* were violated. A&P offered no evidence or argument to support the ground on which summary judgment was affirmed. And the Court of Appeals faulted petitioner for failing to produce evidence on an issue that petitioner was never challenged to address in the district court. Whether this Court

agrees with the majority or the minority view of *Celotex, Box* was wrongly decided.

A&P makes two arguments to avoid *Celotex*. First, A&P says this case is unlike *Celotex* because here A&P supported its motion for summary judgment with evidence. This has no merit. A&P offered no evidence or argument *on the issue on which the Court of Appeals affirmed summary judgment.*[1] A&P is therefore arguing that if it offers evidence on an irrelevant issue, it excuses itself from the burden of offering evidence on the issue on which summary judgment is granted. Nothing in the majority or dissenting opinions in *Celotex* supports this idea. *Celotex* holds that a summary judgment motion can be granted only if supported by evidence *on the issue on which the motion is granted.*[2] Thus, *Box* and *Celotex* raise exactly the same question: whether summary judgment may be granted on a ground as to which the movant has offered no evidence.

Second, A&P argues that petitioner did have notice in the district court that she was being challenged to produce evidence on the issue raised by the Court of Appeals—whether petitioner would have applied for specific assistant manager vacancies had she known of them. A&P does not and cannot claim that petitioner received such notice from anything in A&P's own motion and briefs, since they did not mention this issue. See Petitioner's Appendix I, J, and K. Instead, A&P points to a

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[1] A&P's summary judgment motion argued that petitioner had not filed an EEOC sex discrimination charge and had lost out only to other women in competition for bookkeeper jobs. A&P offered a small amount of evidence on these two claims. A&P, however, offered no evidence whatsoever on the issue decided by the Court of Appeals—whether petitioner would have applied for specific assistant manager jobs had she known of them. To the contrary, A&P argued that any job other than bookkeeper was irrelevant because petitioner's case was confined to a dispute about bookkeeper jobs alone. (Petitioner's Appendix I, J, and K.)

[2] Contrary to A&P's belief, the movant in *Celotex did* offer evidence. See Brief for Respondent in *Celotex*, No. 85-198, pp. 2, 6-7. So in fact, this case is indistinguishable from *Celotex*. In both cases the movant offered evidence, but not on the issue on which summary judgment was granted.

single sentence in the sur-reply brief filed by *petitioner* in the district court. This sentence, according to A&P, shows that even though A&P's own motion and briefs said nothing about the "would have applied" issue, petitioner managed to figure out that she was expected to offer evidence on it.

This argument is legally without merit. A party who is required to produce evidence or face summary judgment is not required, in the absence of notice, to guess at the issue on which evidence is demanded of her; she is entitled to specific notice. Only if she receives specific notice from the movant of the issue in question can she be expected to understand that she has an affirmative obligation to produce evidence on that issue, even though the movant has produced none.

Moreover, A&P misreads petitioner's sur-reply brief. That sur-reply brief reveals not even a glimmer of understanding on petitioner's part that she was being challenged to produce evidence on whether she would have applied for specific assistant manager vacancies. Instead, it reflects petitioner's clear understanding that she had squarely met every argument that A&P had made.[3]

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[3] The sentence quoted by A&P (Respondent's Appendix 4a), is plucked from petitioner's summary of her response to A&P's "bookkeeper" argument. A&P had asked for summary judgment because all the bookkeeper jobs petitioner had applied for had been filled by women, not men. Petitioner responded that she had not limited herself to applying for bookkeeper positions, but had sought promotion for other positions, in particular the assistant manager position, which A&P had filled with men without accepting applications. She added: "And even if Box could not point to a specific position for which a man was preferred, her relegation to a limited employment path in which she was not given a chance to compete with men was clearly discriminatory." Respondent's Appendix 4a.

A&P misconstrues this sentence as an acknowledgement by petitioner that she knew she had to produce evidence that she "would have applied" for a specific position and an admission that she could not provide such evidence. In fact, as the context shows, her meaning was precisely the opposite. Mr. Box was stating that she *had* offered evidence that she had applied for a specific category of position—the assistant manager position—even though she had not been required to offer such evidence.

In short, this case is *Celotex,* whether from the majority's or dissent's perspective. The Court of Appeals gave summary judgment to a party on an issue on which it offered no evidence or argument in the district court, and which petitioner had no notice that she had to address.[4]

A&P also has no adequate response on the substantive Title VII issue raised by petitioner—whether the Court of Appeals erred in requiring a Title VII plaintiff's *prima facie* case to identify the specific positions she would have applied for had she known the employer was filling them. Aside from trying to recast the contrary holdings of the Fourth, Eighth, Ninth, and Eleventh Circuits, A&P argues that a Title VII plaintiff such as Ms. Box must identify the specific positions she would have applied for because otherwise she cannot rule out the possibility that her rejection was due to lack of qualifications. (Respondent's Brief 10.) On the contrary, as the petition showed, A&P prevented Ms. Box and other women from being considered. It did not reject her after a specific comparison with specific men for specific positions. So proving she would have applied for a specific position would show nothing about why A&P selected a man for it. Instead, as the Fourth and Eighth Circuits point out, plaintiff satisfies any "application" requirement by showing she expressed interest in promotion to the *category* of position that the employer was filling without taking applications. Ms. Box did this.

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[4] This conclusion likewise disposes of A&P's attempt to defend the Court of Appeals' affirmance on a factual ground that had not been raised in the district court. A&P argues that a Court of Appeals may affirm summary judgments on grounds not addressed by the district court. But a Court of Appeals may *not* do this unless the party opposing summary judgment had notice in the district court of the factual issue addressed by the Court of Appeals. *Fountain* v. *Filson,* 336 U.S. 681, 683 (1949).

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

GEORGE F. GALLAND, JR.*
PAUL L. STRAUSS

DAVIS, MINER, BARNHILL
& GALLAND
14 West Erie Street
Chicago, IL 60610
(312) 751-1170
Counsel for Petitioner
JoAnn Ford Box

*Counsel of Record